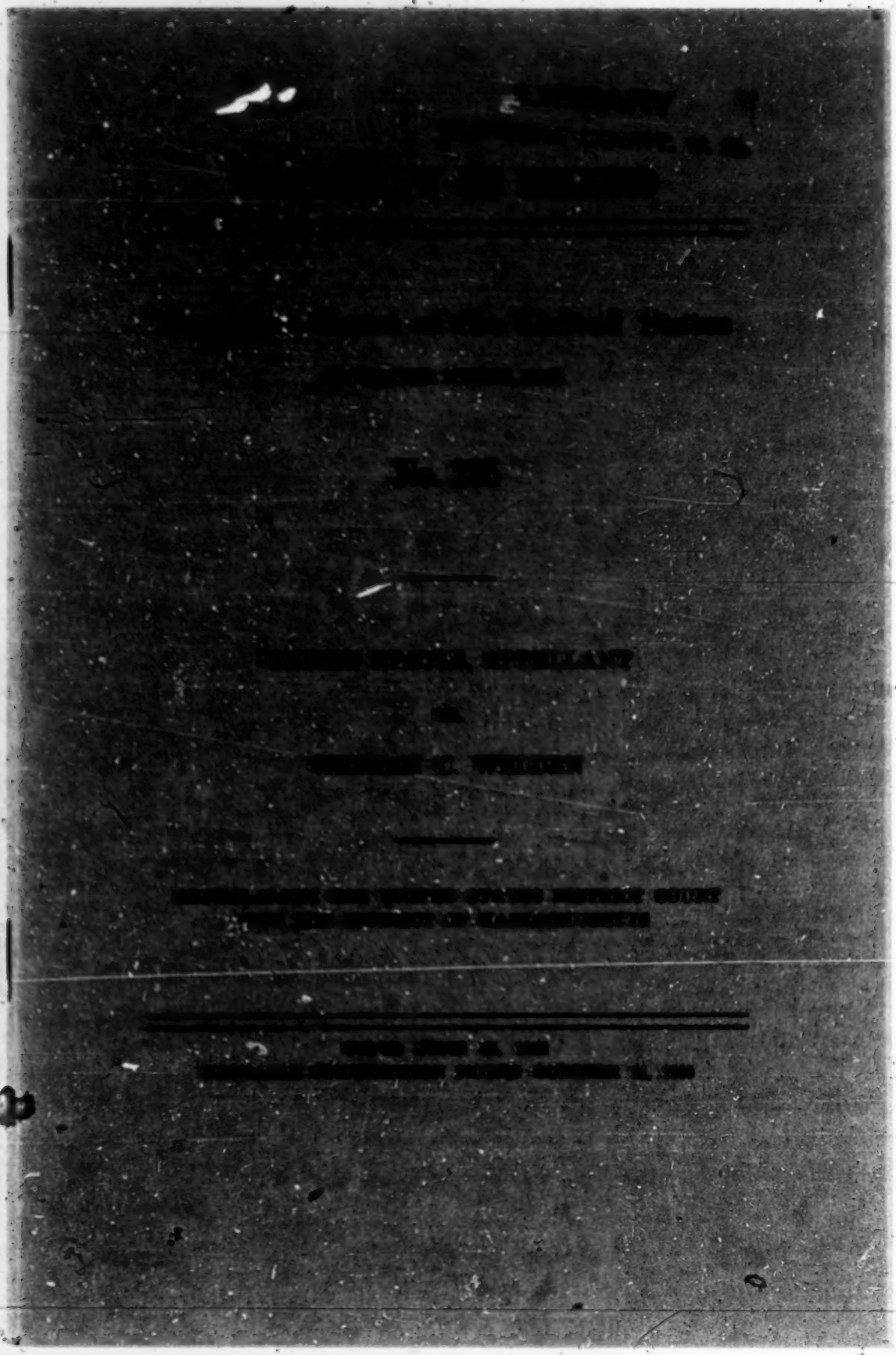

Supreme Court of the United States

OCTOBER TERM, 1963

No. 235

UNITED STATES, APPELLANT

vs.

WILLIAM C. WELDEN

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

INDEX

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

62-286-C

THE UNITED STATES

v.

H. P. HOOD & SONS, INC., UNITED FARMERS OF NEW ENGLAND, INC., NATIONAL DAIRY PRODUCTS CORPORATION, HARVEY P. HOOD, [WILLIAM C. WELDEN, JS6 [4-63] STANLEY W. BEAL, ALBERT C. FISHER, and LEO G. MAHER

* * * *

VIOLATION: SHERMAN ACT—ANTI-TRUST
2 counts

* * * *

Date 1962	DOCKET ENTRIES
Sept. 6	Indictment returned to the Court by the Grand Jury, Indictment filed.
20	Appearance of Sumner H. Babcock, as counsel for defts. National Dairy Products Corp., Albert C. Fisher and Leo G. Maher, filed.
20	Motion of defendant ALBERT C. FISHER for leave to appear for arraignment and to plead through counsel, assented to and filed.
25	CAFFREY, D. J. All Defendants appeared for arraignment and pleaded Not Guilty to all counts, all represented by counsel. Court ordered all held in $1,000. wos and the bonds previously furnished in Cr. 62-147 to suffice for this action. All Defendant Corporations, pleaded by counsel (as in Cr. 62-147) and pleaded Not Guilty to all counts.
25	The court informed all counsel that all motions ruled upon in Cr. 62-147 are in effect in this action. The following stipulations were filed in open Court before the Court's ruling. Bonds filed by A. C. Fisher & Leo G. Maher in Cr. 62-147 be applicable to this action.

Date
1962

[fol. 2]

Sept. 25 CAFFREY, D.J. Stipulated that all motions filed by Dft. Wm. C. Welden in Cr. 62-147-C be applicable to this action., Stipulated that all motions filed by the Dft. H.P. Hood & Sons, Inc. in Cr. 62-147-C be applicable to this action., Stipulated that all motions filed by Dft. Harvey P. Hood in Cr. 62-147-C be applicable to this action., Stipulated that all motions filed by Dft. Corp. National Dairy Products & Dfts. Albert C. Fisher & Leo G. Maher in Cr. 62-147-C be applicable to this action. All stipulations filed. Consent and authorization of Dft. Albert C. Fisher pursuant to Rule 43, to authorize Sumner H. Babcock, Esq. to plead in his behalf., filed. Authorization of National Dairy Products Corp, hereby authorizing Sumner H. Babcock, Esq. to plea for the Dft. corp. filed.
Appearance of Claude B. Cross & Philip M. Cronin, 73 Tremont St. Boston, for Dfts. United Farmers of New England, Inc. & Dft. Stanley W. Beale, filed.
Appearance of Robert W. Meserve & John R. Hally, 75 Federal St. Boston, for Dft. Harvey P. Hood, filed.
Appearance of Edward B. Hanify, 50 Federal St. Boston, for dft. H. P. Hood & Sons, Inc., filed.
A Certificate from Executive Committee of the Board of Directors of H. P. Hood & Sons, Inc. showing the committee unanimously voted: Geo. J. Devlin, Ed. B. Hanif Warren F. Farr, and Ropes & Gray be authorized to appear and plead on behalf of Dft. corp., filed.
Power of Attorney by United Farmers of New England, Inc. authorizing Claude B. Cross & Philip M. Cronin its attorneys to represent and pleade on its behalf, filed.

Date 1962	
Sept. 25	Stipulated that all motions filed by Deft. Stanley W. Beale & United Farmers of New England, Inc., in Cr. 62-147-C be applicable to this action, filed. Appearance of George Lewald, 50 Federal St. Boston, for dft. Wm. C. Welden, filed.
28	Notification by Sumner H. Babcock, Esq. counsel for Dfts. Albert C. Fisher, Leo G. Maher & National Dairy Products, Inc. that Joseph Ford, Esq. (now an Associate Justice of the Superior Ct.) has withdrawn his appearance and Robert Haydock, Jr. of Bingham, Dana & Gould, 1 Federal St. Boston, Mass. appearance. filed
Nov. 1	CAFFREY, D.J. Letter to Mr. Meserve as spokesman for all defendants setting up a schedule as requested by Mr. Meserve in his letter of June 29, 1962. 1. Memoranda in support of the various motions are to be filed by counsel for Defendants on or before 5 p.m. Friday, Nov. 23, 1962; 2. Memoranda in opposition to the allowance of the various motions or memoranda conceding any portion of the motions for bill of particulars, as the case may be are to be filed by counsel for the Government on or before 5 p.m. Wednesday, Dec. 5, 1962. 3. Oral argument on all motions be held at 10 a. m. Monday, Dec. 10, 1962. 4. Reply memoranda by either counsel or Government counsel, if any, in the light of what transpires at oral argument, may be filed not later than 5 p.m. Friday, Dec. 14, 1962. 5. The application to dismiss Cr. No. 62-147 is to be filed with the Government's memoranda due at 5 p.m. Wednesday, Dec. 5, 1962. copies to all counsel mailed.

Date 1962	
Nov. 23	Defendents' memorandum in support of motions for particulars, filed. c/s
23	Defendants' memorandum in support of motion to strike certain allegations from the Indictment, filed. c/s
23	Defendants' memorandum in support of motion to strike certain allegations from the Indictment, filed. c/s
23	Joint memorandum of defendants in support of Motion to dismiss, (Sections I-III), filed.
[fol. 3]	
23	Defendants' memorandum in support of Motions for Particulars, filed. c/s
26	Joint memorandum of defts in support of motion to dismiss (Sections IV-VII), filed.
26	Defts' Exhibits to joint memorandum of defts in support of motion to dismiss, filed.
26	Defts' Exhibit E, filed.
Dec. 5	Government's Memorandum in opposition to Defendants' Motion to strike, filed c/s
5	Government's Memorandum in opposition to defendants' Motions for Bills of Particulars filed, c/s
5	Government's Memorandum in opposition to defendants' Motions to Dismiss filed c/s
5	Affidavit by William J. Elkins, Esq. attorney for Antitrust Division of the U.S. Department of Justice re: Defendents Motion to Dismiss, filed
5	Affidavit by John A. Canavan, Clerk of the U.S. District Court re: selection of jurors, filed.

Date		
1962		
Dec.	5	Conformed copy of Order For Grand Jury, Sept. 14, 1961 signed by Francis J.W. Ford, Judge of the U.S. District Court and Austin W. Jones, Jr. Deputy Clerk of the U.S. District Court filed.
	10	CAFFREY, D.J. Hearing on Defendants Motions for Particulars, to strike, and to dismiss. After argument, the Government gave to defendants paperes Re: Motion for Particulars. The Court informed the defendants they had until 5 p.m. Dec. 17, 1962 to notify the court as to their acceptance. The Court informed all counsel the other motions would remain pending subject to the case before the Court of Appeals. The Court informed counsel Cr. 62-147 (old indictment) was dismissed on Dec. 5, 1962. All reply briefs on Motion for Particulars must be filed by 5 p.m. Dec. 20, 1962.
	20	Reply memorandum of deft. Welden in support of Motion to dismiss, filed (with duplicate copy) . . . Sections VI-VII.
	20	Joint reply of defendants in support of motion to dismiss, filed, (with duplicate copy).
1963		
Feb.	7	Government's Motion to Impound Documents, together with Affidavit of Wm. J. Elkins in support of Order Impounding Documents, filed. c/s
	14	Request of George Lewald by letter dated Feb. 13, 1963 as follows "Please be advised that I wish to be heard in opposition to the Government's Motion to Impound Documents. Will you kindly notify me when this matter is set for hearing."
Mar.	1	Government's memorandum in support of motion to impound documents, filed with 2 copies.

Date
1963

fol. 4]

Mar. 4 CAFFREY, D.J. Hearing on Gov. Motion to Impound Documents, All counsel in attendance, and no one objecting, MOTION ALLOWED.

6 CAFFREY, D.J. ORDER FOR IMPOUNDING DOCUMENTS entered . . . IT IS NOW THEREFORE ORDERED that all documents and copies of documents, heretofore produced in response to the aforesaid subpoenas *duces tecum* be and the same are hereby impounded in the custody of the Clerk of the U.S. District Court, District of Massachusetts, and that without further order of this Court, counsel for the United States may remove any or all of said documents to their offices at the U.S. Department of Justice, New York 4, N.Y. for their continued use in preparation of said case for trial, and for use in connection with any other judicial proceedings arising out of said investigation.

IT IS FURTHER ORDERED that counsel for the United States may, with approval of counsel for defendants and without any further order of this Court, return to those who produced them any of such documents which will not be required in any such proceeding.

IT IS FURTHER ORDERED that any material concerning which the defendant or any of them are given the right to inspect, shall be brought to Boston, Mass., for that purpose. Wm. Elkins, Esq., notifying other side.

Date 1963		
Mar.	27	CAFFREY, D.J. MEMORANDUM AND ORDER entered . . . All motions for bills of particulars are denied; all motions to strike are denied; the motions to dismiss filed on behalf of the corporate defendants and the defts. Hood, Beal, Fisher and Maher are denied. The motion to dismiss the indictment as to defendant Welden is allowed. The indictment is dismissed as to deft. Wm. C. Welden. Cpys to West Pub. Messrs Elkins, Babcock, Hanify, Harrington, Claude Cross and Philip Cronin; Robert Meserve and John Hally, Geo. J. Devlin and Geo. H. Lewald.
	27	CAFFREY, D.J. JUDGMENT entered (re: Wm. C. Welden) In accordance with Memorandum and Order of the Court handed down this date, it is ORDERED: Judgment of acquittal for defendant William C. Welden. Cpys to Messrs Elkins Babcock, Hanify, Harrington, Claude Cross and Philip Cronin; Robert Meserve and John Hally, Geo. J. Devlin and Geo. H. Lewald.
Apr	26	Stenographic transcript of proceedings on April 16, 1963, filed.
	26	Notice of Appeal to the Supreme Court filed by gov't. with c/s/attached
May	15	Appellee's cross-designation of record to be certified on appeal filed. c/s

[fol. 5]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

62-147-C

THE UNITED STATES

v.

H. P. HOOD & SONS, INC., UNITED FARMERS OF NEW ENGLAND, INC., NATIONAL DAIRY PRODUCTS CORPORATION, HARVEY P. HOOD, WILLIAM C. WELDEN, STANLEY W. BEAL, ALBERT C. FISHER, and LEO G. MAHER

* * * *

VIOLATION: ANTI-TRUST SHERMAN ACT 15 USC § 1
T 18 Sec. 371 US Code
2 Counts

* * * *

Date 1962	DOCKET ENTRIES
Apr. 24	Indictment returned to the Court by the Grand Jury
26	CAFFREY, D. J. Hearing on Oral motion of Joseph Ford, Esq., for Dfts' Fisher, Maher & Nat. Dairy Products Corp.- Wm. Elkins Esq., and Chas Donelan, Esq., for Gov. and opposing. Memo of Defendants Fisher and Maher, filed. (1) Motion to withstay fingerprints and photos by Marshal following arraignment and (2) Motion to waive appearance of Deft. Fisher at arraignment—After argument—*Both Motions denied.*

Date 1962	
Apr. 26	Court informed counsel—(there will be an order issued to U.S. Marshal to prohibit photographers from 12th floor P.O. Bldg.—on Monday Apr. 30, 1962—at time of arraignment.
27	Appearance of Robert W. Meserve and John R. Hally of Nutter McClennan & Fish, 75 Federal St., Boston, Mass., as counsel for defendant Harvey P. Hood, filed.
27	Appearance of George J. Devlin of 500 Rutherford Ave., Boston, Mass as counsel for H.P. Hood & Son Inc.,
[fol. 6]	
27	Appearance of John M. Harrington of 50 Federal St., Boston, Mass., as counsel for William C. Welden, filed.
27	Appearance of George Lewald of 50 Federal St., Boston, Mass., as counsel for William C. Welden, filed.
27	Appearance of Joseph Ford, Bingham, Dana & Gould of 1 Federal St., Boston, Mass., as counsel for National Dairy Corporation, Leo Maher and Albert C. Fisher, filed.
27	Appearance of Edward B. Hanify of 50 Federal St., Boston, Mass., as counsel for H.P. Hood & Sons, Inc., filed.
27	Appearance of Claude B. Cross and Philip M. Cronin of 73 Tremont St., Boston, Mass., as counsel for United Farmers of New England Inc., and Stanley W. Beal, filed.

Date 1962		
Apr.	30	CAFFREY, D.J. *Arraignment* — (Violation Anti Trust Laws) H.P. Hood Inc. (rep. by Edward B. Hanify, Esq.,) P/A filed—Plea of N/G United Farmers of New England (rep by Claude B. Cross Esq.,) P/A filed—Plea N/G National Dairy Products Inc. (rep. by Joseph Ford, Esq., P/A filed—Plea N/G Harvey P. Hood (with counsel) Plea of Not Guilty—Bail $1,000.00 w/o/s William C. Weldon (with counsel) Plea of Not Guilty—Bail $1,000.00 w/o/s Stanley W. Beal (with counsel) Plea of Not Guilty—Bail $1,000.00 w/o/s Albert C. Fisher (with counsel) Plea of Not Guilty—Bail $1,000.00 w/o/s Leo G. Maher (with counsel) Plea of Not Guilty—Bail $1,000.00 w/o/s *All Defendants*—60 days for special pleas.
	30	Appearance bond for Harvey P. Hood, filed. Request for copy by Robert Meserve, Esq.
	30	Appearance bond for Wm. C. Welden, filed. Request for copy by John M. Harrington, Jr., Esq.
	30	Appearance bond for Stanley W. Beal, filed.
	30	Appearance bond for Albert C. Fisher, filed.
	30	Appearance bond for Leo G. Maher, filed.
May	3	Copies of Appearance Bonds mailed to Messrs Harrington and Meserve.
	4	Motion of deft. Harvey P. Hood for modification of appearance bond, filed, and *assented* to by William J. Elkins, Atty, AntiTrust Div. Dept. of Justice on May 4, 1962.

Date 1962		
May	4	Motion of defendant William C. Welden for modification of appearance bond, filed, and *assented* by William J. Elkins, Atty, AntiTrust Div. Dept. of Justice on May 4, 1962
	4	CAFFREY, D.J. Motion of deft. Harvey P. Hood for modification of appearance bond, *allowed*, Atty Robert Meserve notified by phone.
	4	CAFFREY, D.J. Motion of deft. William C. Welden for modification of appearance bond, allowed Atty John M. Harrington, Jr., notified by phone.
	10	Stenographic record of proceedings on Apr. 30, 1962, filed.
Jun	29	Motion of defendant National Dairy Products Corporation to dismiss Indictment, filed. c/s
	29	Motion of the deft. Leo G. Maher to dismiss Indictment, filed. c/s
	29	Motion of defendant Albert C. Fisher to dismiss Indictment filed. c/s
	29	Motion to dismiss Indictment of United Farmers of New England, Inc., filed. c/s
	29	Motion to dismiss Indictment of deft. Stanley W. Beal, filed. c/s
	29	Motion of deft. Stanley W. Beal for particulars of certain allegations in the deft., filed. c/s

[fol. 7]

	29	Motion of deft. United Farmers of New England, Inc. to strike certain allegations of Indictment, filed. c/s
	29	Motion of the deft. Harvey P. Hood for a bill of particulars, filed. c/s
	29	Motion of the defendant Harvey P. Hood to dismiss the Indictment, filed. c/s

Date 1962		
Jun	29	Motion of the deft. Harvey P. Hood to strike certain allegations of the Indictment, filed. c/s
	29	Motion of defts. National Dairy Products Corporation, Albert C. Fisher and Leo G. Maher for particulars of certain allegations of Indictment, filed. c/s
	29	Motion of defts. National Dairy Products Corp., Leo G. Maher and Albert C. Fisher to strike certain allegations of Indictment, filed. c/s
	29	Motion of deft. Stanley W. Beal to strike certain allegations of Indictment filed, c/s
	29	Motion of defendant United Farmers of New England, Inc., for particulars, filed. c/s
Jul	2	Motion of the defendant William C. Welden to dismiss the Indictment, filed. c/s
	2	Motion of the deft. William C. Welden to strike certain allegations of the Indictment filed. c/s
	2	Motion of the defendant William C. Welden for a bill of particulars, filed. c/s
	2	Motion of the defendant H.P. Hood & Sons, Inc., for a bill of particulars, filed c/s
	2	Motion of the defendant H.P. Hood & Sons, Inc., to dismiss the Indictment filed. c/s
	2	Motion of the defendant H.P. Hood & Sons, Inc., to strike certain allegations of the Indictment filed. c/s
	11	Motion of Albert C. Fisher for leave to withdraw motion to dismiss Indictment filed June 29, 1962, and to file, in lieu thereof, motion to dismiss Count One of the Indictment, filed. c/s

Date 1963		
Jul	11	Motion of the defendant Albert C. Fisher to dismiss Count One of the Indictment, filed. c/s
Sept.	5	Motion of Defendant Harvey P. Hood for Modification of appearance Bond, Assented to Allowed
Nov.	1	CAFFREY, D.J. Letter to Mr. Meserve as spokesman for all defendants setting up a schedule as requested by Mr. Meserve in his letter of June 29, 1962: 1. Memoranda in support of the various Motions are to be filed by counsel for Defendants on or before 5 p.m. Friday, Nov. 23, 1962; 2. Memoranda in opposition to the allowance of the various motions or memoranda conceding any portion of the motions for bill of particulars, as the case may be, are to be filed by counsel for the Government on or before 5 p.m. Wed. Dec. 5, 1962. 3. Oral arguments on all motions to be held at 10 a.m. Mon. Dec. 10, 1962. 4. Reply memoranda by either counsel or Government counsel, if any, in the light of what transpires at oral arguments, may be filed not later than 5 p.m. Fri. Dec. 14, 1962. 5. The application to dismiss Cr. No. 62-147 is to be filed with the Government's Memoranda due at 5 p.m. Wed. Dec. 5, 1962. copies of this letter mailed to all counsel.

[fol. 8]

Dec.	5	Dismissal of Indictment, filed
	5	CAFFREY, D.J. Leave to file Dismissal of Indictment GRANTED.

[fol. 9]

[Clerk's Certificate to foregoing papers omitted in printing.]

[fol. 10]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. 62-286-C CRIMINAL

UNITED STATES OF AMERICA

v.

H. P. HOOD & SONS, INC., UNITED FARMERS OF NEW ENGLAND, INC., NATIONAL DAIRY PRODUCTS CORPORATION, HARVEY P. HOOD, WILLIAM C. WELDEN, STANLEY W. BEAL, ALBERT C. FISHER, and LEO G. MAHER, DEFENDANTS

INDICTMENT—filed September 6, 1962

The Grand Jury charges:

COUNT ONE

I. *The Defendants*

1. H. P. Hood & Sons, Inc. (hereinafter referred to as "Hood"), a corporation organized and existing under the laws of the Commonwealth of Massachusetts with offices in Boston, Massachusetts, is hereby indicted and made a defendant herein. Hood is engaged in business as a milk handler in the states of Maine, Vermont, New Hampshire, Connecticut, Rhode Island and the Commonwealth of Massachusetts.

2. United Farmers of New England, Inc. (hereinafter referred to as "United Farmers"), a cooperative corporation organized and existing under the laws of the State of Vermont with offices in Boston, Massachusetts, is hereby indicted and made a defendant herein. The membership of United Farmers is composed of approximately 2,300 member dairy farmers located in Maine, New Hampshire, Vermont, and New York and is engaged in business as a milk handler in the aforementioned states and in the Commonwealth of Massachusetts.

3. National Dairy Products Corporation (hereinafter referred to as "National Dairy"), a corporation organized and existing under the laws of the State of Delaware with offices in New York, New York, is hereby indicted and [fol. 11] made a defendant herein. National Dairy was, during the period of time covered by this indictment, engaged in business as a milk handler in the Greater Boston area under the name Deerfoot Farms, which was operated at times by either National Dairy's General Ice Cream Division or National Dairy's Northeastern Division of its Sealtest Division. On December 31, 1959 the business of Deerfoot Farms was sold by defendant National Dairy to defendant United Farmers.

4. The following named individuals are hereby indicted and made defendants herein. Each of the defendants named in this paragraph personally and actively participated as a conspirator in the offense charged and has performed acts in furtherance thereof. Within the period of time covered by this indictment, and within five years preceding the return of this indictment, each was associated with one of the following corporations in the capacity indicated:

a. Harvey P. Hood. He was the President of H. P. Hood & Sons, Inc. until January, 1962 when he became Chairman of its Board of Directors. He resides in Brookline, Massachusetts.

b. William C. Welden. He is the Economist for H. P. Hood & Sons, Inc., and resides in Winchester, Massachusetts.

c. Stanley W. Beal. He is the General Manager of United Farmers of New England, Inc., and resides in Wellesley Hills, Massachusetts.

d. Albert C. Fisher. He was, during the period of time covered by this indictment, Vice President of the General Ice Cream Division of National Dairy Products Corporation, and resides in Scarsdale, New York.

e. Leo. G. Maher. He was, during the period of time covered by this indictment, the General Manager of National Dairy's milk business in the Greater Boston area, which was operated under the name Deerfoot Farms.

[fol. 12] He is currently the Manager of National Dairy's Sealtest Ice Cream Plant in Cambridge, Massachusetts and resides in Needham, Massachusetts.

II. *Co-conspirators*

5. Various corporations and individuals not made defendants herein participated as co-conspirators with the defendants in the offense charged herein and performed acts and made statements in furtherance of said offense. Said co-conspirators, some of them being unknown to the grand jurors, included among them the Whiting Milk Company, Inc. (hereinafter referred to as Whiting), a corporation organized and existing under the laws of the Commonwealth of Massachusetts with offices in Boston, Massachusetts. Whiting is engaged in business as a milk handler in the states of Maine, Vermont, New Hampshire, Connecticut, Rhode Island and the Commonwealth of Massachusetts.

III. *Definitions*

6. Whenever used in this indictment, the terms:

a. "Raw milk" means unprocessed cow's milk;

b. "Milk" means processed raw milk sold by milk handlers for human consumption as whole milk;

c. "Person" means any individual, partnership, corporation or other legal entity;

d. "Producer" means a person possessing cows and engaged in the business of selling raw milk produced by such cows to milk handlers;

e. "Milk handler" means a person engaged in the processing of raw milk purchased from producers and bottling, selling and distributing milk to wholesale, retail and institutional customers;

f. "Greater Boston area" means Boston, Massachusetts and the surrounding area having a radius of ap- [fol. 13] proximately 25 miles from Boston, Massachusetts.

IV. *Nature of Trade and Commerce Involved*

7. The Greater Boston area is an important market for the purchase, processing, sale and distribution of

milk. Approximately 350,000,000 quarts of milk having a value in excess of $70,000,000 are sold there annually. Of this total about 80% is purchased as raw milk from producers located outside the Commonwealth of Massachusetts, of which the State of Vermont alone accounts for over 30%. During the period of time covered by this indictment, the corporate defendants and Whiting operated major processing plants in the Greater Boston area from which they supplied more than 70% of the milk sold in that market.

8. Milk is a perishable commodity and can only be stored for a short period of time prior to its sale and consumption. Accordingly, it must reach the consumer within a short time after it is taken from the cow. Milk obtained by producers on dairy farms located in the six New England States is hauled every day to country stations maintained by milk handlers where the raw milk is assembled and then transported in trucks and rail tank cars to processing plants operated by milk handlers. A substantial amount of this raw milk is transported to processing plants owned by the corporate defendants and Whiting in the Greater Boston area. When the raw milk arrives at the processing plants it is pumped into large vats for pasteurization. It is then packaged and distributed to wholesale, retail and institutional consumers. Thus, from day to day there is a regular, continuous and substantial flow of milk in interstate commerce from producers in the various states of New England to consumers located in the Greater Boston area.

9. Hood maintains approximately 30 country stations in the six New England states. Every day raw milk is [fol. 14] transported from the country stations to one of Hood's eight processing plants which are located in the states of Maine, Connecticut, Vermont, New Hampshire, Rhode Island and the Commonwealth of Massachusetts. Hood's largest processing plant is located in Boston, Massachusetts, and the milk processed at this plant is distributed by Hood to consumers in the Greater Boston area. This plant handles approximately 400,000 quarts of milk daily, over 80% of which comes from producers located in Maine, Vermont and New York.

10. United Farmers receives raw milk from its approximately 2,300 member dairy farmers located in the states of Maine, New Hampshire, Vermont and New York, and processes it at its plant in Boston, Massachusetts. The milk processed at this plant is distributed by United Farmers to consumers in the Greater Boston area and other parts of Eastern Massachusetts.

11. Until December 31, 1959 National Dairy processed raw milk at its plant in Newton, Massachusetts and distributed milk from there to consumers in the Greater Boston area and other parts of Eastern Massachusetts. More than 80% of the milk processed in Newton, Massachusetts was assembled at National Dairy's country stations in Cambridge, New York and Middlebury, Vermont.

12. Whiting obtains its entire supply of raw milk from country stations and farm cooperatives located in the State of Vermont. Whiting maintains three processing plants which are located in Massachusetts and Rhode Island, to which the raw milk from Vermont is shipped. Whiting's largest processing plant is located in Boston, Massachusetts, and most of the milk processed at this plant is distributed by Whiting to consumers in the Greater Boston area and other parts of Eastern Massachusetts.

13. During the period covered by this indictment the corporate defendants—Hood, United Farmers and Na- [fol. 15] tional Dairy—and Whiting sold and delivered a substantial amount of milk to, among others, retail stores and vending machine operators located in the Greater Boston area. In order to supply the requirements for milk so delivered the aforementioned corporations regularly purchased raw milk from producers having farms located outside the Commonwealth of Massachusetts which they thereafter processed and delivered as milk within the Greater Boston area.

14. During the period covered by this indictment the corporate defendants—Hood, United Farmers and National Dairy—and Whiting sold and delivered a substantial amount of milk to federal, state and municipal institutions located in the Greater Boston area, included among which were schools, hospitals and military instal-

lations. In addition, the corporate defendants and Whiting sold and delivered milk to military installations which were located outside the Greater Boston area and in the states of Maine, New Hampshire and Massachusetts. Sales to all such institutions by the corporate defendants and Whiting were approximately $3,000,000 annually. To obtain their milk requirements the aforementioned institutions issued invitations to bid to milk handlers which would in turn submit their bids to the respective institutions. Contracts were awarded to the milk handlers which submitted the lowest bid in response to such invitations. In order to supply the requirements for milk under such contracts and to provide for other anticipated demands, the aforementioned corporations regularly purchased raw milk from producers having farms located outside the Commonwealth of Massachusetts which they thereafter processed and delivered as milk to the aforementioned federal, state and municipal institutions.

V. *Offense Charged*

15. Beginning in about March 1956 and continuing [fol. 16] thereafter to sometime in 1959, the exact dates being to the grand jury unknown, the defendants and co-conspirators entered into and have engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in milk in violation of Section 1 of the Act of Congress of July 2, 1890 as amended (15 U.S.C. § 1), commonly known as the Sherman Act.

16. The aforesaid combination and conspiracy consisted of a continuing agreement and concert of action among the defendants and co-conspirators, the substantial terms of which were that they agreed:

a. To raise, fix, stabilize and maintain prices, terms and conditions for the sale of milk in the Greater Boston area;

b. To allocate among themselves the business of selling milk to designated federal, state and municipal institutions located in Maine, New Hampshire and Massachusetts;

c. To either refrain from submitting bids or price quotations to the said federal, state and municipal institutions allocated to any other corporate defendant or Whiting or to submit high complementary bids or price quotations not intended to attract the award;

d. To eliminate the solicitation of each other's customers in various geographic areas within the Greater Boston area.

17. In formulating and effectuating the aforesaid unlawful combination and conspiracy the defendants and co-conspirators entered into various agreements, understandings and arrangements among themselves and have done various things and have performed various acts including, among others, the following:

a. During the period of time covered by this indictment they met at various places including, among others, the Harvard Club, the University Club and the Union Club in Boston, Massachusetts;

[fol. 17] b. At such meetings they allocated the bid business of the aforementioned institutions among themselves and, from time to time, reaffirmed such allocations;

c. The corporate defendant or corporate co-conspirator allocated a particular bid contract would communicate to the others, usually at such meetings, the amount that it was to bid, so that the others, if they submited bids, would submit bids in an amount not calculated to attract the award;

d. At such meetings they divided certain of such bid business by rotating it among themselves, and on at least one occasion, decided the order of such rotation by tossing coins.

VI. *Effects*

18. The combination and conspiracy alleged in this Count of the Indictment had, among others, the following effects:

a. Wholesale and retail prices on milk sold in the Greater Boston area were raised, fixed, maintained and stabilized at high and artificial levels.

b. Competition among the corporate defendants and Whiting in the sale and distribution of milk to designated federal, state and municipal institutions in Maine, New Hampshire and Massachusetts was suppressed and eliminated;

c. Designated federal, state and municipal institutions in Maine, New Hampshire and Massachusetts were fraudulently denied the right to receive competitive sealed bids in the purchase of their milk requirements as required by law, and have been forced to pay high and artificially-fixed prices for milk;

d. Competition among the corporate defendants and Whiting in the sale and distribution of milk in the Greater Boston area was restrained, suppressed and eliminated.

[fol. 18] VII. *Jurisdiction and Venue*

19. The offense alleged in this Count of the Indictment was committed in part within the District of Massachusetts within five years preceding the return of this Indictment.

COUNT TWO

VIII. *The Defendants*

20. The allegations contained in paragraphs 1 through 3 of this Indictment are here realleged with the same force and effect as though said paragraphs were here set forth in full.

21. The following named individuals are hereby indicted and made defendants herein:

a. Harvey P. Hood. He was President of H. P. Hood & Sons, Inc. until January 1962 when he became Chairman of its Board of Directors. He resides in Brookline, Massachusetts.

b. William C. Welden. He is the Economist for H. P. Hood & Sons, Inc. and resides in Winchester, Massachusetts.

c. Leo G. Maher. He was formerly the General Manager of National Dairy Products Corporation's milk business in the Greater Boston area, which was operated under the name Deerfoot Farms. He is currently the Manager of National Dairy Products Corporation's Sealtest Ice Cream plant in Cambridge, Massachusetts and resides in Needham, Massachusetts.

IX. *Co-conspirators and Definitions*

22. The allegations contained in paragraphs 5 and 6 of this Indictment are here realleged with the same force and effect as though said paragraphs were here set forth in full.

[fol. 19]

X. *Background of Offense*

23. During the period covered by Count Two of this Indictment, the United States of America through its various departments and agencies purchased a substantial quantity of milk for the requirements of certain of its installations located in the Commonwealth of Massachusetts and the states of Maine and New Hampshire. In an effort to obtain this milk at competitive prices the United States periodically invited suppliers, including the corporate defendants and Whiting, to submit sealed bids for contracts to supply the milk requirements of such installations. These contracts generally were for a fixed period of either three or six months and were awarded to the lowest responsible bidder. In response to these invitations to bid each of the defendant corporations and Whiting has regularly submitted bids to said installations and on numerous occasions contracts to supply the milk requirements of these installations were awarded to said corporations on the basis of the bids so submitted.

XI. *Offense Charged*

24. Beginning at least as early as November 1956 and continuing thereafter to sometime in 1959, the exact dates being to the grand jury unknown, defendants and co-conspirators knowingly conspired to defraud the United

States in violation of Section 371 of Title 18 of the United States Code.

25. The aforesaid conspiracy consisted, among other things, of a continuing agreement, understanding and concert of action to defraud and injure the United States by depriving the United States of America of the right and duty to let contracts for the sale of milk to federal installations located in the Commonwealth of Massachusetts and the states of Maine and New Hampshire during the said period by means of competitive bidding to the lowest responsible bidder, and by obtaining and aiding to obtain the payment of false and fraudulent claims under [fol. 20] periodic contracts awarded to the corporate defendants and Whiting as a result of such collusive bidding.

26. It was part of the said conspiracy that, while keeping up the appearance of competition and conveying to federal awarding authorities the idea and belief that the corporate defendants and Whiting were competitive bidders, the defendants and co-conspirators agreed to avoid and prevent competition and deceive the awarding authorities by secretly allocating among the corporate defendants and Whiting the periodic contracts to supply milk to designated installations operated by agencies of the United States at prices higher than those which would have prevailed had there been no such allocation.

27. It was a further part of the said conspiracy that, while keeping up an appearance of competition and conveying to federal awarding authorities the idea and belief that the corporate defendants and Whiting were competitive bidders, a representative of the corporation selected to submit the successful bid for a periodic contract would secretly communicate the amount of such bid to the other corporate defendants and Whiting prior to the date on which bids were to be submitted, and that such others would refrain from bidding or would submit high, non-competitive, collusive, complementary bids not intended or calculated to attract the award, all to the mutual profit of the corporate defendants and Whiting, the injury of the United States, and the impairment of governmental functions.

XII. *Overt Acts*

28. In furtherance of the said conspiracy and to effect the object thereof, certain of the defendants and co-conspirators did commit, among others, the following overt acts in the District of Massachusetts:

a. In or about November 1956, the defendants William C. Welden and Leo G. Maher, met with co-conspira-
[fol. 21] tors at the Harvard Club, in Boston, Massachusetts.

b. On or about September 11, 1957, at Boston, Massachusetts, defendant United Farmers formulated and submitted to the Boston Naval Shipyard, Navy Department, a bid for a contract to supply milk.

c. On or about December 16, 1957, at Boston, Massachusetts, co-conspirator Whiting formulated and submitted to the Boston Naval Shipyard, Navy Department, a bid for a contract to supply milk.

d. On or about June 10, 1958, at Boston Massachusetts, defendant Hood formulated and submitted to the Boston Naval Shipyard, Navy Department, a bid for a contract to supply milk.

e. On or about September 6, 1957, at Boston, Massachusetts, defendant Hood formulated and submitted to the Portsmouth Naval Shipyard, Navy Department, a bid for a contract to supply milk.

f. On or about September 7, 1958, at Boston, Massachusetts, co-conspirator Whiting formulated and submitted to the Portsmouth Naval Shipyard, Navy Department, a bid for a contract to supply milk.

29. The following table reflects consecutive periods of particular bid contracts to supply milk to the Portsmouth Naval Shipyard, Navy Department, the dates of the pertinent bid openings and the names of the successful bidders on such contracts during the period of time covered by this Indictment. By the terms of the said conspiracy the periodic contracts for this installation were to be alternated between Whiting and defendant Hood; and, pursuant to said conspiracy, these contracts were alternately allocated to Whiting and defendant Hood by the defendants and the co-conspirators:

Contract Period	Date of Opening	Successful Bidder
January-March 1957	Dec. 7, 1956	Whiting
April-June 1957	Mar. 7, 1957	Hood
July-September 1957	June 7, 1957	Whiting
Oct.-December 1957	Sept. 6, 1957	Hood

[fol. 22]

Jan.-March 1958	Dec. 6, 1957	Whiting
Apr.-September 1958	Mar. 7, 1958	Hood
Oct. 1958-Mar. 1959	Sep. 7, 1958	Whiting
Apr.-September 1959	Mar. 6, 1959	Hood

30. The following table reflects consecutive periods of particular bid contracts to supply milk to the Boston Naval Shipyard, Navy Department, the dates of the pertinent bid openings and the names of the successful bidders on such contracts during the period of time covered by this Indictment. By the terms of the said conspiracy the periodic contracts for this installation were to be divided into two sections and rotated among defendant Hood, Whiting, and defendant United Farmers, with two of the three sharing the contract each period; and, pursuant to said conspiracy these contracts were allocated to Hood, Whiting, and United Farmers by the defendants and co-conspirators:

Contract Period	Date of Opening	Successful Bidders
Jan-March 1957	Dec. 12, 1956	Hood and United Farmers
Apr.-June 1957	Mar. 11, 1957	Whiting and United Farmers
July-Sept. 1957	June 10, 1957	Hood and Whiting
Oct.-Dec. 1957	Sept. 11, 1957	Hood and United Farmers
Jan.-March 1958	Dec. 16, 1957	Whiting and United Farmers
Apr.-June 1958	Mar. 11, 1958	Hood and Whiting

31. Pursuant to said conspiracy defendants and co-conspirators also submitted non-competitive and collusive bids to various other federal instrumentalities in the Commonwealth of Massachusetts and the states of Maine and New Hampshire, including Hanscom Air Force Base, Bedford, Massachusetts; Otis Air Force Base, Falmouth, Massachusetts; Pease Air Force Base, Portsmouth, New

Hampshire; United States Public Health Service Hospital, Boston, Massachusetts; and the Nike Site at Ft. Banks, Massachusetts.

32. Pursuant to said conspiracy, and as a result of the acts done in furtherance thereof, the corporate defendants [fol. 23] Hood and United Farmers and co-conspirator Whiting have been awarded contracts for the sale of milk to federal installations in the Commonwealth of Massachusetts and the states of Maine and New Hampshire, and have received payments thereunder, on the basis of bids which they submitted and which they falsely and fraudulently represented to be bona fide, independent, competitive, and not the product of any collusion or agreement between the bidders, and the prices of which bids they further falsely and fraudulently represented to be normal, reasonable and competitive; whereas, in fact known to defendants but unknown to the United States of America, the said bids submitted were sham and collusive and not the result of open competition, and the said prices were unreasonable, arbitrary, and non-competitive.

33. With respect to each such contract awarded for the sale of milk during the aforesaid period of the conspiracy, Whiting or the corporate defendant to which such contract was awarded presented and caused to be presented to the United States for payment or approval by it numerous claims, knowing such claims to be false and fraudulent in that each such claim was based on a contract which had been falsely and fraudulently procured by reason of the aforesaid bidding practices.

XIII. *Effects*

34. As a result of the presentment to it of the aforesaid false and fraudulent claims, and without knowledge thereof, the United States has paid the false and fraudulent claims to the corporate defendants and Whiting.

35. As a result of the illegal conspiracy and the defendants' acts in furtherance thereof, the United States has been denied the right to receive competitive bids in the purchase of milk and has been compelled to pay substantially higher prices for milk then would have been the case but for said illegal conspiracy.

[fol. 24] XIV. *Jurisdiction and Venue*

36. The offense alleged in Count Two of this Indictment was carried out in part within the District of Massachusetts within five years preceding the return of this Indictment.

Dated:

A TRUE BILL:

/s/ Robert L. Feeney
Foreman

/s/ Lee Loevinger
Assistant Attorney General

/s/ Harry G. Sklarsky

/s/ John J. Galgay

/s/ John D. Swartz

Attorneys, Department of Justice

/s/ William J. Elkins

/s/ Charles Donelan

/s/ Stephen M. Ross

Attorneys, Department of Justice

[fol. 25]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

H. P. HOOD & SONS, INC., UNITED FARMERS OF NEW ENGLAND, INC., NATIONAL DAIRY PRODUCTS CORPORATION, HARVEY P. HOOD, WILLIAM C. WELDEN, STANLEY W. BEAL, ALBERT C. FISHER, and LEO G. MAHER, DEFENDANTS

MOTION OF THE DEFENDANT WILLIAM C. WELDEN TO DISMISS THE INDICTMENT filed June 29, 1962 in Criminal No. 62-147-C

The defendant, William C. Welden, moves that the court dismiss the indictment as to him and as grounds therefor sets forth the following.

1. The portion of the general conspiracy statute (18 U.S.C. 371) under which the defendant is charged in Count Two of the indictment, namely, "or to defraud the United States, or any agency thereof, in any manner or for any purpose", is unconstitutional in that it provides no ascertainable standard of guilt or notice as to what is forbidden, and therefore is void for vagueness all in violation of the 5th and 6th Amendments of the United States Constitution.

[fol. 26] 2. Count Two of the indictment fails to charge the defendant with an offense under 18 U.S.C. 371 in that:

(a) It alleges a conspiracy to allocate and submit collusive bids to designated federal agencies or departments, which conspiracy, if an offense at all, is an offense under the federal anti-trust laws which themselves require a conspiracy and concert of action.

(b) It attempts to charge conspiracy offenses covered specifically by Section 1 of the Sherman Act (15 U.S.C. 1) and Section 14 of the Clayton Act (15 U.S.C. 24), all to the exclusion of 18 U.S.C. 371.

(c) It attempts to charge a conspiracy in part of the same nature as that charged in Count One, especially Paragraph 15 and subparagraphs 16(b), 16(c), 18(b) and 18(c), and as a result thereof the conspiracy charged in Count Two has been fragmented from the conspiracy charged in Count One, to the prejudice of the defendant.

(d) It is vague and uncertain as to the defendant and fails to allege facts sufficient to charge him with a conspiracy to defraud the United States.

3. Count Two in addition to alleging an offense under 18 U.S.C. 371 also charges an offense under 18 U.S.C. 287 and therefore is duplicitous.

[fol. 27] 4. The Grand Jury, that returned the indictment against the defendant was unlawfully arrayed and therefore not legally qualified to return a true bill. Citizens of the United States residing in the District of Massachusetts and otherwise qualified for jury service whose names were not on the voting lists of their respective communities were unlawfully and systematically excluded as qualified persons for jury service, and all citizens of the United States residing in six of fourteen counties in said District were unlawfully excluded as qualified persons for jury service, all in violation of Article III and Amendments 6 and 7 of the United States Constitution and 28 U.S.C. 1861 *et seq.*

5. The indictment against the defendant was irregularly and unlawfully procured. The first-appointed Deputy Foreman of the Grand Jury that returned the indictment against the defendant, and who was discharged by the court during the course of the proceedings of said Grand Jury, was an improper person present during the presentation of evidence and the examination of witnesses before said Grand Jury all to the prejudice of the defendant, and each of his acts and functions which he performed under the color of his office was and is a nullity.

6. The defendant is being prosecuted for and on account of transactions, matters, and things concerning which he has given testimony and produced documentary and other evidence before the Federal Trade Commission, in behalf of the government, in the proceeding entitled "In the Matter of H. P. Wood & Sons, Inc., Docket No. 7709," and therefore such prosecution of him by this indictment is prohibited under the provisions of 15 U.S.C. 32 and 15 U.S.C. 49.

7. The defendant is being prosecuted for and on account of transactions, matters, and things concerning which he has given testimony and produced documentary and other evidence before a duly authorized Special Sub-[fol. 28] committee on Small Business Problems in the Dairy Industry of the Select Committee on Small Business (House of Representatives, Eighty-sixth Congress, Second Session, pursuant to H. Res. 51. A Resolution Creating A Select Committee To Conduct A Study And Investigation Of The Problems Of Small Business.) and therefore such prosecution of him by this indictment is prohibited under the provisions of 15 U.S.C. 32.

The defendant hereby offers to prove the foregoing allegations of fact as set forth in Paragraphs 4, 5, 6, and 7, and requests a hearing for this purpose.

By his Attorney

/s/ George H. Lewald
50 Federal Street
Boston, Massachusetts

[fol. 29]

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 30]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
United States Court House
Foley Square
NEW YORK 7, N. Y.

In Reply
Refer to

Initials and Number

WJE:mon
60-139-137

November 19, 1962

Honorable Andrew A. Caffrey
United States District Judge
District of Massachusetts
1505 United States Courthouse
Boston 9, Massachusetts

Re: *United States* v. *H. P. Hood & Sons, Inc., et al*

Dear Judge Caffrey:

In Mr. Hanify's letter of November 9, 1962 to the Court reference is made to the defendants' requests for hearings to receive evidence upon several motions presently before the Court. The motions with respect to which these requests are made are the motion to dismiss on the ground that the grand jury was unlawfully arrayed, the motion to dismiss on the ground that the Indictment was irregularly and unlawfully procured and the motion to dismiss as to defendant William C. Welden on the ground that he is entitled to immunity from prosecution under Title 15 U.S.C. Sec. 32, Title 15 U.S.C. Sec. 49.

It is the Department's position that it is unnecessary to hold hearings to receive evidence upon these motions. The

motion to dismiss on the ground that the Indictment was irregularly and unlawfully procured is based solely upon the discharge by the Court of the first appointed deputy foreman of the grand jury during the course of the proceedings of the grand jury. The discharge of this deputy foreman was the subject of a hearing held before Judge Ford on March 14, 1962. This hearing fully explored the facts that resulted in the discharge and would appear to leave no facts in issue. The incorporation of the transcript of this hearing into the record of the instant case would appear to obviate the necessity of holding an evidentiary hearing on this motion.

Defendant William C. Welden's motion to dismiss the Indictment on the ground that he is entitled to immunity [fol. 31] from prosecution is based upon testimony given before the Federal Trade Commission and the Special Subcommittee on Small Business Problems in the dairy industry of the Select Committee on Small Business. There appears to be no issue of fact either as to the fact that defendant Welden so testified or as to his testimony. The issue is whether the legal effect of the testimony is to confer immunity upon this defendant. The incorporation of the transcript of the hearings at which defendant Welden has given testimony would obviate the necessity of an evidentiary hearing on this motion.

Lastly, the defendants' motion to dismiss the Indictment on the ground that the grand jury was unlawfully arrayed is based on the fact that voting lists of the respective communities comprising the district are used as a source of jurors and the fact that jurors are drawn from only six of the fourteen counties that comprise the district. The Government is willing to stipulate to these facts.

It is therefore submitted that the defendants are not entitled to a hearing to receive evidence upon any of the said motions, inasmuch as there are no issues of fact raised by these motions that necessitate a hearing. We submit that the necessity of hearings be covered by de-

fense counsel in briefs and in arguments, and in accordance with the schedule already set by the Court.

Respectfully yours,

LEE LOEVINGER
Assistant Attorney General

By: /s/ John J. Galgay—W. J. Elkins
JOHN J. GALGAY
Chief, New York Office

cc: Edward B. Hanify, Esq., 50 Federal St., Boston
George H. Lewald, Esq., 50 Federal St., Boston
Claude Cross, Esq., 73 Tremont St., Boston
Sumner Babcock, Esq., 1 Federal St., Boston
Robert W. Meserve, 75 Federal St., Boston

[fol. 32]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

H. P. HOOD & SONS, INC., UNITED FARMERS OF NEW ENGLAND, INC., NATIONAL DAIRY PRODUCTS CORPORATION, HARVEY P. HOOD, WILLIAM C. WELDEN, STANLEY W. BEAL, ALBERT C. FISHER, and LEO G. MAHER, DEFENDANTS

DISMISSAL OF INDICTMENT—filed December 5, 1962 in Cr. No. 62-147-C

Now comes WILLIAM J. ELKINS, Attorney, Antitrust Division, Department of Justice, and pursuant to Rule 48 of the Federal Rules of Criminal Procedure, dismisses the indictment pending in the above-entitled case which was returned April 24, 1962 for the reason that a superseding indictment, Criminal No. 62-286-C, was returned on September 6, 1962 against the same defendants.

/s/ William J. Elkins
Attorney
Antitrust Division
Department of Justice

Leave to file granted: 12-5-62

/s/ Andrew A. Caffrey
United States District Judge

[fol. 33]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Cr. No. 62-286-C

UNITED STATES OF AMERICA

v.

H. P. HOOD & SONS, INC., et al

STIPULATION—filed September 25, 1962

It is hereby stipulated by and between the plaintiff and the defendant, William C. Welden, that all motions filed by the said defendant directed to the indictment in United States v. H. P. Hood & Sons, Inc., et al, Cr. No. 62-147-C (D. Mass.) shall be deemed directed to the indictment in United States v. H. P. Hood & Sons, et al, Cr. No. 62-286-C (D. Mass.)

/s/ William J. Elkins
Attorney for United States

/s/ George H. Lewald
Attorney for Defendant William C. Welden
50 Federal St.
Boston, Mass.

[fol. 34]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Copy

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Brooks Robertson

You are hereby commanded to summon Mr. William Welden, H. P. Hood and Sons, 500 Rutherford Ave., Charlestown, Mass. to be and appear before the Special Subcommittee of the Select Committee on Small Business of the House of Representatives of the United States, of which the Hon. Tom Steed is chairman, and to present to him the documents, records, and papers setting forth the text, terms, and conditions of agreements between the H.P. Hood and Sons and The Great Atlantic and Pacific Tea Company, or officials of those firms relating to the distribution and sale of milk, other dairy products and related items, during the period 1937 to the date of this subpoena, in the Gardiner Auditorium, State House, Boston, Massachusetts on February 18, 1960, at the hour of 2:30 p.m. then and there to testify touching matters of inquiry committed to said Committee; and he is not to depart without leave of said Committee.

Herein fail not, and make return of this summons.

Witness my hand and seal of the House of Representatives of the United States, at the city of Washington, this 3rd day of February, 1960

/s/ Tom Steed
Chairman
Special Subcommittee

Attest:

/s/ Ralph R. Roberts
Clerk.

CERTIFIED A TRUE COPY

/s/ Brooks Robertson
Brooks Robertson, Staff Director, Select Committee on Small Business, U. S. House of Representatives

[fol. 35]

SMALL BUSINESS PROBLEMS IN THE DAIRY INDUSTRY

HEARINGS

Before the

SPECIAL SUBCOMMITTEE OF THE
SELECT COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

EIGHTY-SIXTH CONGRESS

Second Session

Pursuant to

H. RES. 51

A Resolution Creating a Select Committee to Conduct a Study and Investigation of the Problems of Small Business

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PART IV

Boston, Mass.

February 17, 18, and 19, 1960

[omitted in printing]

[fol. 36]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 62-286-C

UNITED STATES OF AMERICA

v.

H. P. HOOD & SONS, INC., UNITED FARMERS OF NEW ENGLAND, INC., NATIONAL DAIRY PRODUCTS CORPORATION, HARVEY P. HOOD, WILLIAM C. WELDEN, STANLEY W. BEAL, ALBERT C. FISHER, LEO G. MAHER

MEMORANDUM and ORDER—March 27, 1963

CAFFREY, D.J.

The five individual and three corporate defendants filed a series of substantially identical motions. In addition a claim of immunity to prosecution was asserted by the defendant William C. Welden. The motions will be dealt with *seriatim*.

I. *The Motions for Bills of Particulars.* The indictment filed herein, which was drawn in clear and simple language, sufficiently apprises each defendant of the nature of the offenses charged to enable him or it to prepare a defense and to protect each defendant from any risk of double jeopardy. *Russell* v. *United States*, 369 U.S. 749, 763-4 (1962). All motions for bills of particu-
[fol. 37] lars are denied.

II. *The Motions to Strike Certain Allegations of the Indictment.* All motions to strike are denied. *United States* v. *Russo*, 155 F.Supp. 251, 254 (D. Mass. 1957).

III. *The Motions to Dismiss.* The motions to dismiss filed on behalf of the corporate defendants and the defendants Hood, Beal, Fisher and Maher are denied. The motion to dismiss the indictment as to defendant Welden is allowed.

I find that Mr. Welden was subpoenaed to appear before a Special Subcommittee of the Select Committee on Small Business of the House of Representatives, 86th Congress, 2d Session, pursuant to H.Res. 51, and to bring with him certain documents, records and papers of H. P. Hood Company for the period 1937 to the date of the subpoena and I find that the subpoena required Mr. Welden "then and there to testify touching matters of inquiry committed to said Committee." I further find that pursuant to the subpoena Welden produced documents of Hood and was then interrogated at considerable length as to the nature of his activities on behalf of Hood and as to the price policy of the company. I find that Welden testi-
[fol. 38] fied on February 18 and 19, 1960, about economic practices pursued by the Hood Company, about the competitive situation in the Greater Boston milk market, about price changes and policies of Hood, and about meetings between himself and representatives of competitors of Hood, to such an extent as to bring him within the immunity provision of 15 U.S.C.A. 32. I find absolutely no evidence in the record presently before this Court of any waiver of his immunities by Mr. Welden. It must be remembered that waiver is to be found only upon clear proof thereof. See *Himmelfarb* v. *United States*, 175 F.2d 924, 931 (9 Cir. 1949). It is immaterial that Welden did not affirmatively claim immunity. *United States* v. *Monia*, 317 U.S. 424, 430 (1943).

I rule that Mr. Welden's testimony was pertinent "to the very heart and substance of the matters charged in the indictment." *United States* v. *Armour*, 64 F.Supp. 855, 857 (E.D. Pa.1946). I reject the Government's contention that 18 U.S.C.A. 3486 is the exclusive source of immunity to persons testifying before a Congressional committee. A reading of Section 3486 makes it clear that Congress in enacting that section was concerned only with the immunity of witnesses testifying before Congressional committees in the area of national security and defense. This section does not purport to regulate the im-
[fol. 39] munity question in any Congressional investigation outside the area of national defense and security.

The word "proceeding" in 15 U.S.C.A. 32 should not be given the narrow technical scope argued for by the Government where to do so would fly in the face of traditional American notions of fair play (cf. *McDonald* v. *Mabee*, 243 U.S. 90 (1917)) and subject a defendant to stand trial for conduct about which he has been compelled to testify by the subpoena power of a Congressional Subcommittee. *United States* v. *Armour*, 142 Fed. 808 (N.D. Ill.1906); cf. *Bowers* v. *New York & Albany Lighterage Co.*, 273 U.S. 346, 352 (1927).

Finally, the Government's contention that the hearings were not conducted under the anti-trust laws as required by 15 U.S.C.A. 32 before immunity will attach is disposed of by the words of Chairman Tom Steed in opening the hearings: "The purpose of these hearings is to receive testimony about alleged attempts of large distributors of dairy products in the New England area to destroy small competitors and to gain control over prices and markets." Hearings before the Special Subcommittee of the Select Committee on Small Business of the House of Representatives, 86th Cong., 2nd Sess., Part IV, at 363 (1960). The hearings were clearly within the ambit of the immu-
[fol. 40] nity statute.

The indictment is dismissed as to defendant William C. Welden.

/s/ Andrew A. Caffrey
U. S. D. J.

[fol. 41]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 62-286-C

UNITED STATES OF AMERICA

v.

H. P. HOOD & SONS, INC., UNITED FARMERS OF NEW ENGLAND, INC., NATIONAL DAIRY PRODUCTS CORPORATION, HARVEY P. HOOD, WILLIAM C. WELDEN, STANLEY W. BEAL, ALBERT C. FISHER, LEO G. MAHER

JUDGMENT—March 27, 1963

In accordance with Memorandum and Order of the Court handed down this date, it is

ORDERED:

Judgment of acquittal for defendant William C. Welden.

By the Court,

/s/ William J. Lyons
Deputy Clerk

/s/ Andrew A. Caffrey
U. S. D. J.

[fol. 42]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Court Room No. 2
U. S. Post Office and Court House
Boston, Massachusetts

HEARING OF APRIL 16, 1963

MR. GALGAY. We asked for this conference for two reasons. The first is the order of judgment that was entered in this case, it is not in conformity with your memorandum and order. The last line of your memorandum and order states that the indictment as to Weldon is dismissed, whereas your judgment orders it is an acquittal. I think under the rules if you believe it to be an error you can correct it on your own motion.

THE COURT. What do you say?

MR. LEWALD. I do not know that the phraseology is terribly important. I have no objection if your Honor feels there is any error, on the record.

THE COURT. I am not clear on what you say the error is.

MR. GALGAY. I think the effect of an order of acquittal is different from the order of dismissal on the defendant Weldon. I do not know how it would affect its admissibility. It is a minor point. Mr. Canavan might have some judgment on it. I do think it ought to be corrected.

[fol. 43] MR. CANAVAN. At the end of your memorandum and order you say the indictment is dismissed against Weldon. When judgment was entered there was a judgment of acquittal. I suppose your order is in conformity with—

MR. GALGAY. Rule 12, that is, providing for dismissal.

MR. CANAVAN. As I understand it, there was no hearing on the merits here.

THE COURT. Whereabouts in Rule 12 do you see anything about the form of the order?

MR. CANAVAN. Nothing about the form of the order. It was a proceeding in conformity—

THE COURT. I don't think there is any question about that.

MR. CANAVAN. Your order was in conformity with Rule 12. You ordered dismissal. But when the judgment was entered it was a judgment of acquittal.

THE COURT. What kind of judgment would be entered?

MR. CANAVAN. Dismissing the indictment as to the defendant Weldon.

MR. GALGAY. Do you have an acquittal before you for a hearing on the merits?

THE COURT. I will take it under advisement. I am [fol. 44] not going to decide it without looking at the law.

MR. GALGAY. The next point is the opinion your Honor filed in connection with the motions of the defendant Weldon. I bring this up because the question of the appeal from that motion has been given considerable thought in Washington.

If you will recall the defendant's motion, defendant Weldon's motion dealt with the immunity problem. It was in two parts, Paragraph 6 and Paragraph 7. Paragraph 6 dealt with immunity under Title 15, Section 49, which applies to the Federal Trade Commission. Section 7 dealt with the congressional hearing.

As your Honor will recall, his opinion was based on immunity having been obtained on Weldon's testimony before the congressional committee. Having in mind the Department's relationship with the Supreme Court and the number of appeals we do file, we are quite concerned about the problem of appealing from your Honor's opinion.

Based on Weldon's immunity, obtained through the congressional committee, if we were successful before the Supreme Court and they returned the case to this Court it would be only to have the defendant Weldon then raise the question of immunity under Title 15, Section 49, dealing with his testimony before the Federal Trade Commission.

[fol. 45] Your Honor also is silent on any immunity obtained before the Federal Trade Commission.

Rather than put the Department in the position of going to the Supreme Court and if it is successful, coming down and then going up again, we suggest to your Honor perhaps a supplemental opinion might be written expressing your attitude on whether or not Weldon obtained immunity by his appearance before the Federal Trade Commission.

THE COURT. That I decline to do.

MR. GALGAY. I do not know what I can say that might extend the argument. I have been authorized to state that if the Court did see fit to write a supplemental opinion and even if that opinion were negative so far as the government was concerned, in that posture other questions as to appealability would be raised, where it would be unlikely that the government would appeal.

MR. ELKINS. If we were to petition the Court, perhaps more formally, we would predicate that petition solely on the grounds of efficient administration of justice in order to avoid going back to the Supreme Court twice, let us say, rather than once, or as Mr. Galgay suggests, if at all.

THE COURT. I once heard Judge Wyzanski make [fol. 46] the statement he did not give "iffy" or advisory opinions. I reached a decision on one claim of the defendants which disposes of the case. I don't care to speculate on anything that is not necessary to decide and determine.

If you want to file something formally, you are free to file anything you want. I am not inclined to get into an academic exercise which is not necessary to determine what is before me.

[Clerk's Certificate to foregoing paper omitted in printing.]

[fol. 47]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 62-286-C

UNITED STATES OF AMERICA

v.

H. P. HOOD & SONS, INC., UNITED FARMERS OF NEW ENGLAND, INC., NATIONAL DAIRY PRODUCTS CORPORATION, HARVEY P. HOOD, WILLIAM C. WELDEN, STANLEY W. BEAL, ALBERT C. FISHER, LEO G. MAHER.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—filed April 26, 1963

Notice is hereby given that the United States of America appeals to the Supreme Court of the United States from the judgment of acquittal for defendant William C. Welden dated and entered herein March 27, 1963. This appeal is taken pursuant to 18 U.S.C. 3731.

Defendant Welden was charged with the offenses of conspiring (a) to restrain trade and commerce, in violation of Section 1 of the Sherman Act (15 U.S.C. 1) and, (b) to defraud the United States, in violation of 18 U.S.C. 371. Defendant Welden moved to dismiss the indictment on the ground that he was immune from prosecution by virtue of testimony he gave in other proceedings. Upon allowance of that motion in bar, judgment of acquittal was entered, and the defendant is not in custody.

II.

The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Indictment, filed September 6, 1962.
2. Dismissal filed December 5, 1962, of the indictment returned April 24, 1962, in Cr. No. 62-147-C.

[fol. 48] 3. Motion filed June 29, 1962 of defendant William C. Welden to dismiss the indictment (Cr. No. 62-147-C).

4. Stipulation, Filed September 25, 1962, between plaintiff and defendant William C. Welden.

5. Exhibit E to Joint Memo of Defendants in Support of Motion to Dismiss, filed November 26, 1962 (Exhibit E consists of Part IV of the Hearings at Boston on February 17-19, 1960, before the Special Subcommittee on Small Business in the Dairy Industry of the Select Committee on Small Business, House of Representatives, 86th Cong., 2d Sess).

6. Memorandum and Order, filed March 27, 1963.

7. Judgment of Acquittal for defendant William C. Welden, filed March 27, 1963.

8. This notice of appeal.

III

The question presented on this appeal is whether a person who testifies before a Congressional subcommittee is giving evidence in a "proceeding, suit, or prosecution under [the Sherman Act]" within the meaning of 15 U.S.C. 32, and thereby obtains immunity from prosecution with respect to any matter concerning which he testified.

/s/ John J. Galgay
Attorney, Department of Justice, Attorney for the United States

Dated: April 24, 1963

[fol. 49]

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 50]

[File Endorsement Omitted]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 62-286-C

UNITED STATES OF AMERICA

v.

H. P. HOOD & SONS, INC., UNITED FARMERS OF NEW ENGLAND, INC., NATIONAL DAIRY PRODUCTS CORPORATION, HARVEY P. HOOD, WILLIAM C. WELDEN, STANLEY W. BEAL, ALBERT C. FISHER, LEO G. MAHER.

APPELLEE'S CROSS-DESIGNATION OF RECORD TO BE CERTIFIED ON APPEAL—filed May 15, 1963

The appellee, William C. Welden, herein files and serves his designation of additional portions of the record to be certified by the Clerk to the Supreme Court of the United States.

The Clerk will please include in the transcript of the record in the captioned case for certification to the Supreme Court the following additional portions of the record:

1. Letter of Lee Loevinger, Assistant Attorney General, by John J. Galgay to the Honorable Andrew A. Caffrey, United States District Judge, District of Massachusetts, dated November 19, 1962.
2. Command of Special Subcommittee of the Select Committee on Small Business House of Representatives Eighty-Sixth Congress Second Session pursuant to H. Res. 51 to summons Wiliam C. Welden to [fol. 51] testify touching matters of inquiry committee to said Committee, etc. on February 18, 1960.

3. Transcript of Hearing on April 16, 1963, before Andrew A. Caffrey, United States District Judge for the District of Massachusetts.
4. This Cross-Designation.

WILLIAM C. WELDEN
By his Attorney,

/s/ George H. Lewald
GEORGE H. LEWALD
ROPES & GRAY
50 Federal Street
Boston, Massachusetts

PROOF OF SERVICE (omitted in printing)

[fol. 53] * * *

[fol. 54]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 55]

SUPREME COURT OF THE UNITED STATES

No. 235, October Term, 1963

UNITED STATES, APPELLANT

vs.

WILLIAM C. WELDEN

APPEAL from the United States District Court for the District of Massachusetts.

ORDER NOTING PROBABLE JURISDICTION—October 14, 1963

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 712867 437

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CITATIONS

691096—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM C. WELDEN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

OPINION BELOW

The Memorandum and Order of the district court (Appendix A, *infra*, pp. 15–18) is not yet reported.

JURISDICTION

The indictment was filed under Section 1 of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. 1) and under the Conspiracy Act (18 U.S.C. 371). The judgment of acquittal of appellee Welden (Appendix B, *infra*, p. 19) was entered on March 27, 1963, upon the district court's grant of appellee's motion to dismiss the indictment on the ground that appellee had obtained immunity from prosecution by virtue of testimony he gave before a Congressional committee. Notice of appeal was filed on April 26, 1963.

The jurisdiction of this Court to review by direct appeal the judgment of the district court is conferred by the Criminal Appeals Act (18 U.S.C. 3731); since that judgment is one "sustaining a motion in bar, when the defendant has not been put in jeopardy." *United States* v. *Monia*, 317 U.S. 424; *United States* v. *Hoffman*, 335 U.S. 77.

STATUTE INVOLVED

The Act of February 25, 1903, 32 Stat. 854, 904, 15 U.S.C. 32, provides in part:

> * * * no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts [the Interstate Commerce Act, the Sherman Act, and the antitrust provisions of the Wilson Tariff Act]: *Provided further*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

QUESTION PRESENTED

Whether a person who testifies before a Congressional subcommittee is testifying in a "proceeding, suit, or prosecution under" the antitrust laws and thereby obtains immunity under 15 U.S.C. 32 from prosecution with respect to any matter concerning which he testifies.

STATEMENT

On September 6, 1962, an indictment was returned against three corporations—H. P. Hood & Sons, Inc.,

United Farmers of New England, Inc., and National Dairy Products Corporation—and five individuals, including appellee who is an employee of H. P. Hood & Sons, Inc.[1] Count One charged the defendants with violating Section 1 of the Sherman Act by conspiring, among other things: to fix prices in the sale of milk in the Greater Boston Area; to allocate among themselves the business of selling milk to designated federal, State, and municipal institutions in Maine, New Hampshire, and Massachusetts; and to engage in collusive bidding for contract awards from these institutions. Count Two charged all three corporations and three of the individuals, including appellee, with a conspiracy to defraud and injure the United States in violation of 18 U.S.C. 371.

Appellee moved to dismiss the indictment on a number of grounds.[2] One ground was that prosecution was prohibited under the provisions of 15 U.S.C. 32 because he had previously given testimony before a House subcommittee concerning transactions, matters, and things covered by the indictment. It is unnecessary to set out the particulars of appellee's testimony before the House subcommittee, for no contention is made by the government here, and none was made below, that the testimony given did not concern

[1] The indictment of September 6, 1962, superseded one returned on April 24, 1962, against the same defendants. The April 24th indictment was dismissed by the government, with the consent of the court, on December 5, 1962.

[2] Appellee's motion was addressed to the April 24th indictment, but by stipulation filed on September 25, 1962, the motion was made applicable to the September 6th indictment.

in a substantial way the matters charged in the indictment.[3]

The district judge on March 27, 1963, filed a Memorandum and Order, upholding appellee's position and rejecting the government's contention that testimony before a Congressional committee is not given in "a proceeding * * * under [the antitrust laws]" within the meaning of 15 U.S.C. 32. Accordingly, the judge concluded that 15 U.S.C. 32 bars appellee's prosecution and dismissed the indictment as to him.[4]

THE QUESTION IS SUBSTANTIAL

Appellee testified in response to a subpoena before a Congressional committee investigating certain economic practices in the dairy industry. He did not claim the privilege against self-incrimination or in any way indicate an unwillingness to testify. It is and has been the government's contention that ap-

[3] Appellee's testimony is set forth in Hearings before the Special Subcommittee of the Select Committee on Small Business, House of Representatives, 86th Cong., 2d Sess., Part IV, pp. 665–700. These hearings, which concerned practices in the distribution of dairy products, are included in the record certified to this Court. The Select Committee had been authorized by the House to study and investigate the problems of all types of small business (H. Res. 51, 86th Cong., 1st Sess., 105 Cong. Rec. 1785) and its chairman appointed the Special Subcommittee to study the problems of small business in the dairy industry (H. Rep. 714, 86th Cong., 1st Sess.).

[4] The district court did not pass on appellee's alternative contention that he had obtained immunity as a result of testimony given in a Federal Trade Commission proceeding, although it was specifically requested to do so by the government (Transcript of April 16, 1963, pp. 3–5).

pellee was free to rely upon his Fifth Amendment privilege and could refuse to give self-incriminatory testimony before the Congressional committee because no statute granted him immunity from prosecutions involving matters about which he might testify before such a committee. The district court rejected this contention. It held that appellee received immunity under 15 U.S.C. 32, which grants immunity to any witness testifying under subpoena in any proceeding under the Sherman Act or the antitrust provisions of the Wilson Tariff Act, without any requirement of asserting his Fifth Amendment privilege. This holding is contrary to the explicit wording of the statute and is inconsistent with the statute's history. It will seriously impair the freedom of Congress to investigate various economic wrongs; it will unduly limit the privilege of a witness to invoke the Fifth Amendment before a Congressional committee; and it will needlessly prevent the proper performance of the government's duty to prosecute violations of a number of federal statutes.

1. Section 32 of Title 15 provides:

> No person shall be prosecuted * * * for * * * any * * * matter * * * concerning which he may testify * * * in any proceeding, suit, or prosecution under sections 1–7 of this title * * * and sections 8–11 of this title. * * *

On its face, this language does not cover testimony given before Congressional committees. The sections in Title 15 to which explicit reference is made constitute the Sherman Act and the antitrust provisions of the Wilson Tariff Act. These statutes authorize a

variety of proceedings to enforce the several remedies for which they provide, including (1) criminal prosecutions for violations;[5] (2) suits in equity to enjoin violations;[6] and (3) forfeiture proceedings.[7] The "proceeding, suit, or prosecution *under* sections 1–7 of this title * * * and sections 8–11 of this title" [italics added] to which section 32 refers are those proceedings authorized by these Acts. Hearings of Congressional committees are conducted under resolutions of a House of Congress; they are not proceedings "under" the antitrust laws within the meaning of section 32. Indeed we know of no prior case, during the sixty years since the passage of what is now 15 U.S.C. 32, which has held this statute applicable to testimony given before a Congressional committee.[8]

2. Any possible doubt as to the meaning of this provision is dispelled by its legislative history.

A. The immunity provisions contained in 15 U.S.C. 32 were enacted as part of the general appropriations

[5] Sherman Act §§ 1 and 2; Wilson Tariff Act, § 73.

[6] Sherman Act, § 4; Wilson Tariff Act, § 74.

[7] Sherman Act, § 6; Wilson Tariff Act, § 76.

[8] In the court below appellee relied upon an oral opinion of a district court in *United States* v. *Armour & Co.*, 142 Fed. 808 (N.D Ill.), a case also cited by the court below. This opinion was almost entirely devoted to consideration of the scope of a wholly separate immunity provision in a 1903 statute creating a Commissioner of Corporations. It neither involves nor considers the applicabilty of the predecessor provisions of 15 U.S.C. 32 to investigations before a Congressional committee, although, in dictum (at 826), the district court did state—we believe erroneously—that these antitrust immunity provisions would apply to a proceeding before the Commissioner of Corporations.

Act of February 25, 1903, which provided in pertinent part as follows:

> * * * That for the enforcement of the provisions of the [Interstate Commerce] Act * * *, * * * the [Sherman] Act * * * and * * * [the antitrust provisions of the Wilson Tariff] Act, * * * the sum of five hundred thousand dollars * * * is hereby appropriated * * * to be expended under the direction of the Attorney General * * * to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States: *Provided,* That no person shall be prosecuted * * * for * * * any * * * matter * * * concerning which he may testify * * * in any proceeding, suit, or prosecution under said Acts * * *.

In that Act Congress after referring to the Sherman, Interstate Commerce, and Wilson Tariff Acts, appropriated $500,000 "to be expended under the direction of the Attorney General * * * to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States." In the very next sentence Congress then provided immunity for any matter concerning which a person might testify in the type of proceedings for which it had just appropriated $500,000—*i.e.*, "in any proceeding, suit, or prosecution under said Acts * * *." Unless the same phrase was intended to have different meanings in two successive sentences of the same Act, the immunity provision, like the appropriations provision, applied only to proceedings, suits, or prosecutions brought "under the direction of the Attorney General * * * in the courts of the United States." Its obvious purpose was to

give the Attorney General, in the conduct of judicial proceedings under the statutes there specified, the authority to compel incriminating testimony *in such proceedings* whenever the need for such testimony outweighed the public interest in prosecuting the particular witness.

While there have been various minor changes in phraseology in the codification of the immunity provision, there is nothing which indicates, or even suggests, that Congress thereby intended to change the substantive scope of the immunity which it conferred in 1903, namely, that immunity was conferred only for testimony given in judicial proceedings instituted by the Attorney General.

B. Congress has been exceedingly sparing in granting to its committees the power to compel testimony by giving a witness an immunity from prosecution. Since 1862 there has been no provision broadly empowering committees to grant an immunity, commensurate with the Fifth Amendment privilege, for testimony given before them. Compare 11 Stat. 155 with 12 Stat. 333. Setting to one side the issue of this case, we know of only one occasion during the last 100 years on which Congress has granted an immunity for testimony before its committees on any particular subject: the Act of August 20, 1954, which permits committees to grant immunity with respect to matters involving national defense and security but only under carefully prescribed conditions.[9] In the

[9] Statutory prerequisites to this grant of immunity are that: (a) the witness has claimed his privilege against self-incrimination, (b) a two-thirds vote of the full committee has affirmatively authorized the grant of immunity, (c) an order of a

light of this history it is extremely unlikely that, had Congress intended to grant an immunity from prosecution with respect to any matters about which a witness might testify before a committee investigating violations of the antitrust laws, it would have done so without any discussion on the floor or in the committee of either house. Yet the legislative history of the immunity act of 1903 fails to reveal even the slightest indication that Congress intended to grant an immunity for testimony before a legislative committee when it spoke of testimony "in any proceeding, suit, or prosecution under [the antitrust statutes] * * *."

C. The history of the antitrust immunity act of 1903 is intimately involved with that of the Compulsory Testimony Act of 1893 (27 Stat. 443, 49 U.S.C. 46), which created a similar immunity for testimony in judicial or administrative proceedings arising out of violations of the Interstate Commerce Act. When this Court's decision in *Counselman* v. *Hitchcock*, 142 U.S. 547, established that an immunity provision limited to prohibiting the use of evidence furnished by the witness was not commensurate with the scope of a witness' privilege under the Fifth Amendment, it became apparent that the immunity provision of the original Interstate Commerce Act (24 Stat. 383) was ineffective. To remedy this, both houses of Congress considered bills initially limited to testimony "in any criminal case or proceeding"

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federal district court has been entered in the record requiring the witness to give evidence, and (d) the Attorney General has been notified of the proposed grant of immunity and has been given an opportunity to be heard in the district court with respect to each application for an order to compel testimony.

(23 Cong., Rec. 6332; H.Rep. 2173, 52d Cong., 2d Sess.) but later broadened to include not only testimony before the Interstate Commerce Commission but testimony "in any cause or proceeding, criminal or otherwise" (24 Cong. Rec. 709). The statute was passed in the broader form, but its scope was still plainly limited to administrative and judicial proceedings. In January 1902, the Compulsory Testimony Act was held inapplicable to a proceeding under the Sherman Act and was held to be "confined by its terms to proceedings" under the Interstate Commerce Act. *Foot* v. *Buchanan*, 113 Fed. 156, 160 (C.C.N.D. Miss.). Thereupon, and with an evident intent to model the immunity upon that in the Compulsory Testimony Act of 1893, Congress passed the bill which is now found in 15 U.S.C. 32. The history of this statute is barren of any indication that the scope of the immunity there provided was to be any greater than that provided by the Compulsory Testimony Act of 1893, and was to extend to testimony before Congressional committees. The absence of any such indication is particularly significant in light of the inhibiting effect which the broader immunity granted by the district court in this case would have upon the exercise of Congressional investigatory power. See *infra*, pp. 11–12. A statute should not be construed to produce that result unless the intent of Congress to do so clearly appears—and no such intent is manifested, or even suggested, by the language or history of the antitrust immunity provision.

3. The question presented by this appeal is of substantial importance to Congress, to witnesses before

Congressional committees, and to the government officials charged with enforcing the antitrust laws. The hearings of a great number and variety of Congressional committees and subcommittees [10] frequently involve matters of monopoly power and trade restraints. Under the district court's decision, such hearings would fall within the immunity provisions of 15 U.S.C. 32.

Since a witness in a "proceeding" covered by 15 U.S.C. 32 obtains immunity with respect to any matter covered by his testimony, even though he does not claim his privilege against self-incrimination (*United States* v. *Monia,* 317 U.S. 424), any committee investigating matters bearing upon the antitrust laws can, under the decision below, ask questions of witnesses only at the expense of conferring upon these witnesses a broad immunity from criminal prosecution. The certain consequence would be a substantial inhibition upon the exercise by Congress of its normal investigatory functions.

The effects of the decision below upon the enforcement of the antitrust laws and the rights of witnesses

[10] For example, (1) the following standing committees of the Senate: Agriculture and Forestry, Banking and Currency, Commerce, Finance, Interior and Insular Affairs, Judiciary; (2) the following standing committees of the House: Agriculture, Banking and Currency, Interior and Insular Affairs, Interstate and Foreign Commerce, Judiciary, and Merchant Marine and Fisheries; (3) both the House and Senate Select Committee to Conduct a Study and Investigation of the Problems of Small Business; and (4) the following Congressional joint committees: Joint Committee on Atomic Energy, Joint Committee on Defense Production, and Joint Economic Committee.

are equally significant. The rationale of the decision below would grant a wholly unanticipated immunity from prosecution to every witness who has heretofore testified before a Congressional committee investigating antitrust matters. It will grant a similar immunity to every witness who may, in the future, be called by a committee of Congress investigating these matters, whether or not the witness alerts the committee to the fact that its questions bear on matters which may tend to incriminate him.

Finally, the effects of the decision below are not limited to antitrust matters. Other federal immunity statutes fall within the scope of its reasoning. Obvious examples are the immunity provisions of the Interstate Commerce Act (49 U.S.C. 47) which are also derived from the general appropriation Act of February 25, 1903, and later enactments which incorporate these provisions by reference. § 205(d), Motor Carrier Act, 49 U.S.C. 305(d); § 316(a), Water Carrier Act, 49 U.S.C. 916; § 417(a), Freight Forwarders Act, 49 U.S.C. 1017(a); see also §§ 6(b), 8(e)–(g); Commodity Exchange Act, 7 U.S.C. 15.

CONCLUSION

This appeal presents a substantial question of public importance. Probable jurisdiction should be noted.

Respectfully submitted.

RALPH S. SPRITZER,
*Acting Solicitor General.**
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
ROBERT B. HUMMEL,
IRWIN A. SEIBEL,
Attorneys.

JUNE 1963.

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* In place of the Solicitor General, who has disqualified himself for personal reasons.

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Criminal No. 62-286-C

UNITED STATES OF AMERICA

v.

H. P. HOOD & SONS, INC., UNITED FARMERS OF NEW ENGLAND, INC., NATIONAL DAIRY PRODUCTS CORPORATION, HARVEY P. HOOD, WILLIAM C. WELDEN, STANLEY W. BEAL, ALBERT C. FISHER, LEO G. MAHER

MEMORANDUM AND ORDER

MARCH 27, 1963.

CAFFREY, D.J.

The five individual and three corporate defendants filed a series of substantially identical motions. In addition a claim of immunity to prosecution was asserted by the defendant William C. Welden. The motions will be dealt with *seriatim*.

I. *The Motions for Bills of Particulars.* The indictment filed herein, which was drawn in clear and simple language, sufficiently apprises each defendant of the nature of the offenses charged to enable him or it to prepare a defense and to protect each defendant from any risk of double jeopardy. *Russell* v. *United States*, 369 U.S. 749, 763-4 (1962). All motions for bills of particulars are denied.

II. *The Motions To Strike Certain Allegations of the Indictment.* All motions to strike are denied.

United States v. *Russo*, 155 F. Supp. 251, 254 (D. Mass. 1957).

III. *The Motions To Dismiss.* The motions to dismiss filed on behalf of the corporate defendants and the defendants Hood, Beal, Fisher and Maher are denied. The motion to dismiss the indictment as to defendant Welden is allowed.

I find that Mr. Welden was subpoenaed to appear before a Special Subcommittee of the Select Committee on Small Business of the House of Representatives, 86th Congress, 2d Session, pursuant to H. Res. 51, and to bring with him certain documents, records and papers of H. P. Hood Company for the period 1937 to the date of the subpoena and I find that the subpoena required Mr. Welden "then and there to testify touching matters of inquiry committed to said Committee." I further find that pursuant to the subpoena Welden produced documents of Hood and was then interrogated at considerable length as to the nature of his activities on behalf of Hood and as to the price policy of the company. I find that Welden testified on February 18 and 19, 1960, about economic practices pursued by the Hood Company, about the competitive situation in the Greater Boston milk market, about price changes and policies of Hood, and about meetings between himself and representatives of competitors of Hood, to such an extent as to bring him within the immunity provisions of 15 U.S.C.A. 32. I find absolutely no evidence in the record presently before this Court of any waiver of his immunities by Mr. Welden. It must be remembered that waiver is to be found only upon clear proof thereof. See *Himmalfarb* v. *United States*, 175 F. 2d 924, 931 (9 Cir. 1949). It is immaterial that Welden did not affirmatively claim immunity. *United States* v. *Monia*, 317 U.S. 424, 430 (1943).

I rule that Mr. Welden's testimony was pertinent "to the very heart and substance of the matters charged in the indictment." *United States* v. *Armour*, 64 F. Supp. 855, 857 (E.D. Pa. 1946). I reject the Government's contention that 18 U.S.C.A. 3486 is the exclusive source of immunity to persons testifying before a Congressional committee. A reading of Section 3486 makes it clear that Congress in enacting that section was concerned only with the immunity of witnesses testifying before Congressional committees in the area of national security and defense. This section does not purport to regulate the immunity question in any Congressional investigation outside the area of national defense and security.

The word "proceeding" in 15 U.S.C.A. 32 should not be given the narrow technical scope argued for by the Government where to do so would fly in the face of traditional American notions of fair play (cf. *McDonald* v. *Mabee*, 243 U.S. 90 (1917)) and subject a defendant to stand trial for conduct about which he has been compelled to testify by the subpoena power of a Congressional Subcommittee. *United States* v. *Armour*, 142 Fed. 808 (N.D. Ill. 1906); cf. *Bowers* v. *New York & Albany Lighterage Co.*, 273 U.S. 346, 352 (1927).

Finally, the Government's contention that the hearings were not conducted under the anti-trust laws as required by 15 U.S.C.A. 32 before immunity will attach is disposed of by the words of Chairman Tom Steed in opening the hearings: "The purpose of these hearings is to receive testimony about alleged attempts of large distributors of dairy products in the New England area to destroy small competitors and to gain control over prices and markets." Hearings before the Special Subcommittee of the Select Committee on Small Business of the House of Represent-

atives, 86th Cong., 2d Sess., Part IV, at 363 (1960). The hearings were clearly within the ambit of the immunity statute.

The indictment is dismissed as to defendant William C. Welden.

(S) ANDREW CAFFREY,
U.S.D.J.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Criminal No. 62-286-C

UNITED STATES OF AMERICA

v.

H. P. HOOD & SONS, INC., UNITED FARMERS OF NEW ENGLAND, INC., NATIONAL DAIRY PRODUCTS CORPORATION, HARVEY P. HOOD, WILLIAM C. WELDEN, STANLEY W. BEAL, ALBERT C. FISHER, LEO G. MAHER

JUDGMENT

MARCH 27, 1963.

In accordance with Memorandum and Order of the Court handed down this date, it is

ORDERED:

Judgment of acquittal for defendant William C. Welden.

By the Court,

(S) William J. Lyons,
WILLIAM J. LYONS,
Deputy Clerk.

(S) ANDREW CAFFREY,
U.S.D.J.

U.S. GOVERNMENT PRINTING OFFICE: 1963

No. 235

In The Supreme Court Of The United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, *Appellant*

v.

WILLIAM C. WELDEN

On Appeal from the United States District Court
for the District of Massachusetts

MOTION TO AFFIRM

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PRESS OF GEO. H. DEAN CO. BOSTON

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CITATIONS

In The
Supreme Court Of The United States

OCTOBER TERM, 1963

No. 235

UNITED STATES OF AMERICA, *Appellant*

v.

WILLIAM C. WELDEN

On Appeal from the United States District Court for the District of Massachusetts

MOTION TO AFFIRM

Appellee respectfully moves that the Court affirm the judgment of the court below upon the ground that the question presented in the Jurisdictional Statement is so unsubstantial as to make further argument to this Court unnecessary.

OPINION BELOW

The Memorandum and Order of the District Court are not yet reported but are set out as Appendix A to the Jurisdictional Statement.

JURISDICTION

Appellant invokes the jurisdiction of this Court under 18 U.S.C. 3731.

STATUTE INVOLVED

The Act of February 25, 1903, 32 Stat. 854, 904, 15 U.S.C. 32, provides in part:

> • • • no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts [the Interstate Commerce Act, the Sherman Act, and the antitrust provisions of the Wilson Tariff Act]: *Provided further*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

QUESTION PRESENTED

Whether Appellee acquired immunity from this prosecution under 15 U.S.C. 32 by reason of compelled testimony in a Congressional Subcommittee hearing specifically investigating alleged past violations of the antitrust laws.

STATEMENT

Appellee was indicted together with four other individuals and three corporations including Appellee's employer H. P. Hood & Sons, Inc., in a two count indictment charging a conspiracy in violation of Section 1 of the Sherman Act and a conspiracy among some of the defendants to defraud the United States in violation of 18 U.S.C.

371. The court below, upon Appellee's motion, dismissed the indictment as to him upon its findings that Appellee had previously been subpoenaed to appear before a special Subcommittee of the Select Committee on Small Business of the House of Representatives, and there gave testimony under oath which was pertinent "to the very heart and substance of the matters charged in the indictment". It rejected the government's arguments including the contention raised here that the Subcommittee hearings were not conducted under the antitrust laws. Quoting the words of the Subcommittee's Chairman, "The purpose of these hearings is to receive testimony about alleged attempts of large distributors of dairy products in the New England area to destroy small competitors and gain control over prices and markets", the court found that, "The hearings were clearly within the ambit of the immunity statute."

ARGUMENT

I. The Decision Below Was Correct and in Accord with Precedent.

There can be no debate that the investigation in which Appellee gave his testimony was an investigation of subject matter within the scope of the antitrust laws. The court below so found, and its finding, based as it is on a statement of the Subcommittee Chairman at the beginning of the hearing, dispels any doubt whatever.

Appellant's position, as set forth in the Jurisdictional Statement, is that the word "proceedings" as used in the Act of February 25, 1903, 32 Stat. 904 codified as 15 U.S.C. 32, does not include such an investigation because that word is limited to proceedings "authorized" by the antitrust laws. (Jurisdictional Statement, p. 6). Appellant then suggests a further qualification (p. 7) that the pro-

ceedings must be "under the direction of the Attorney General". Both of these propositions were demolished only two years after the Act was passed by the decision of this Court in *Hale* v. *Henkel*, 201 U.S. 43, 66 (1905) that the word "proceeding" as used in this Act was not to receive a narrow or technical construction but was broad enough to include at least an inquiry before a Grand Jury. The antitrust laws, of course, are silent as to Grand Jury investigations, and not only are Grand Jury proceedings not "under the direction of the Attorney General", but they are not a requisite to the commencement of a criminal proceeding under the antitrust laws.

The position taken by the Appellant also ignores the existence of precedent clearly indicating that an investigation of the sort involved in this case brings a witness within the statutory coverage.

Early in 1906 a Federal District Court Judge, with the decision in *Hale* v. *Henkel* before him, held that the statutory immunity extended to witnesses who had appeared before the Commissioner of Corporations, an official of the Department of Commerce, who was conducting an investigation of the "beef trust" pursuant to a resolution of the House of Representatives. *United States* v. *Armour & Co.*, 142 Fed. 808, 826 (D.N.D. Ill. 1906). Two separate immunity provisions were in issue in that case. One was Section 6 of the Commerce and Labor Act of 1903, 32 Stat. 827, which was specifically applicable to the Commissioner of Corporations, and which incorporated by reference the immunity provisions made applicable to the Interstate Commerce Commission by the Compulsory Testimony Act of 1893, 27 Stat. 443. The second was the immunity provision of the Act of February 25, 1903, 32 Stat. 904, which is now 15 U.S.C. 32.

With respect to the former Act, it was urged by the government that it did not apply because the witnesses had

not been compelled by subpoena nor sworn. Judge Humphrey, while rejecting that contention on the ground that the necessary degree of compulsion was present, nevertheless also ruled that an alternative ground of immunity was available:

> "If it shall be said that the act of February 14, 1903, establishing the Department of Commerce and Labor, allows immunity to the witness only upon the conditions urged by the government, viz., that he shall have resisted until regularly subpoenaed and sworn, no such contention can fairly be made as to the immunity clause of the act of February 25, 1903. The record shows, and it is not disputed, that material evidence was procured by Garfield from the defendants upon the subject of an unlawful combination . . . . It is contended that as to all such evidence the defendants are entitled to immunity under the independent and unconditional act of February 25, 1903, and I am of opinion that they are so entitled." 142 Fed. at 826.

The import of Judge Humphrey's ruling is plain. It is that the immunity provided by 15 U.S.C. 32 extends to a proceeding which is an investigation of past antitrust violations by a government official, not under control of the Attorney General, but acting pursuant to the authorization of a resolution of a House of Congress. The parallel to the situation in the case at bar is precise, except that Congress, as is its current practice, elected to have the investigation conducted by a subcommittee of one of its own committees instead of by an official of the Department of Commerce.

The immediate congressional and executive reaction to the decision of Judge Humphrey demonstrates that that decision did not lie hidden under a bushel. What was upsetting, however, was not the holding that the immunity was available in an investigatory proceeding outside of the courts, but that the decision appeared to mean that the immunity might extend to a witness who was in effect a volunteer. A request for corrective legislation was

promptly made by Attorney General Moody and incorporated into President Roosevelt's message to Congress in support of such legislation on April 18, 1906, H.R. Doc. No. 706, 59th Cong. 1st Sess. The result was the enactment of June 30, 1906, 34 Stat. 798 which is now codified as 15 U.S.C. 33. The only change which the Congress saw fit to make, with the result of the *Armour* decision directly before it, was to impose a requirement that henceforth the testimony be given pursuant to a subpoena and under oath.

There can be no doubt of the significance of the *Armour* case or of its relation to the remedial legislation which followed. Speaking for this Court in *United States* v. *Monia*, 317 U.S. 424 (1943) Mr. Justice Roberts summarized the significance and effect of the decision in words which make it clear that he interpreted the decision to have conferred immunity on the witnesses by virtue of 15 U.S.C. 32:

> "In 1906 the District Court for the Northern District of Illinois held, in *United States* v. *Armour & Co.*, 142 F. 808, that a voluntary appearance, and the furnishing of testimony and information without subpoena, operated to confer immunity from prosecution under the Sherman Act. The court held that the immunity conferred was broader than the privilege given by the Fifth Amendment. The decision attracted public interest since, if it stood, one could immunize himself from prosecution by volunteering information to investigatory bodies. Congress promptly adopted the Act of June 30, 1906, *supra*, providing that the immunity should only extend to a natural person who, in obedience to a subpoena, testified or produced evidence under oath. The Congressional Record shows that the sole purpose of the bill was exactly what its language states. Senator Knox, who sponsored the bill, stated: 'Mr. President, the purpose of this bill is clear, and its range is not very broad. It is not intended to cover all disputed provisions as to the rights of witnesses under any circumstances, except those enumerated in the bill itself.'

> "It is evident that Congress, by the earlier legislation, had opened the door to a practice whereby the Government might be trapped into conferring unintended immunity by witnesses volunteering to testify. The amendment was thought, as the Congressional Record demonstrates, to be sufficient to protect the Government's interests by preventing immunity unless the prosecuting officer, or other Government official concerned, should compel the witness' attendance by subpoena and have him sworn." 317 U.S. at 428-429.

It will not do to relegate this holding, the only direct precedent in existence, to a footnote, and to minimize its importance by characterizing it as dictum (Jurisdictional Statement, p. 6).

Additional support for avoidance of a narrow construction of 15 U.S.C. 32 is found in *Howitt* v. *United States*, 150 F. 2d 82 (5th Cir. 1945), *aff'd* 328 U.S. 189 (1946). There the court considered the same statute, as it has been codified as 49 U.S.C. 47 in relation to the Interstate Commerce Act, together with the companion provisions of 49 U.S.C. 43 and 46. The court said:

> "These statutes provide that in summary proceedings in the district court, or in hearings before the Interstate Commerce Commission, *or in any other cause or proceeding, where the purpose of the proceeding is to inquire into alleged violations of the Act,* no person shall be prosecuted or subject to any penalty or forfeiture for any matter concerning which he may testify or produce evidence in such proceeding." (150 F. 2d at 84, emphasis supplied)

The "proceeding" in question in that case was a series of interviews by a number of FBI agents, but the ground which the court selected in denying the immunity was the lack of the requisite subpoena and oath.

II. The Legislative History of 15 U.S.C. 32 Is Not in Conflict with the Decision of the Court Below.

The Appellant sets out three bits of "legislative history" which it suggests require a restrictive reading of the statute in question. In fact none of the three suggestions is in any way in conflict with the interpretation placed upon 15 U.S.C. 32 in *Armour* and followed by the court below. The Appellant's contentions will be dealt with seriatim.

1. It is suggested (Jurisdictional Statement, pp. 6-8) that the original appearance of the statute as a rider to a section of an appropriations act which also referred to "proceedings, suits and prosecutions" requires a limited interpretation of those terms as they now appear. The terms of the statute as enacted are as follows:

> "That for the enforcement of the provisions of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto, and of the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, and all Acts amendatory thereof or supplemental thereto, and sections seventy-three, seventy-four, seventy-five, and seventy-six of the Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and other purposes,' approved August twenty-seventh, eighteen hundred and ninety-four, the sum of five hundred thousand dollars, to be immediately available, is hereby appropriated, out of any money in the Treasury not heretofore appropriated, to be expended under the direction of the Attorney General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States: *Provided*, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any trans-

> action, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts: *Provided further,* That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

The suggestion of Appellant is that unless the proviso be thought to be limited to proceedings, suits or prosecutions brought "under the direction of the Attorney General" the phrase "any proceeding, suit or prosecution" would have a meaning different from substantially the same words "proceedings, suits and prosecutions" as used in the first sentence. The problem, however, is not with the words but with their modifiers. In the appropriations portion of the section the words are limited by the phrase "in the courts of the United States" which does not appear in the immunity section. Similarly, in the appropriations provision, the words referred to are part of an adverbial phrase modifying "to be expended under the direction of the Attorney General". There are no such words in the immunity provision. The Appellant's suggestion, therefore, is that where certain words appear as modifiers or with modifiers in one sentence, and appear again in the next sentence without any modifiers except the word "any", the modifying phrase must be read into the second sentence by implication. Appellant reads the immunity proviso as though it said "any *such* proceeding, suit or prosecution", and indeed when Appellant restates its position (Jurisdictional Statement, p. 8), the word "such" not only appears but is italicized. The difficulty is that the word does not appear in the statute.

And indeed if the word "such" did appear, the immunity proviso would then be limited to the proceedings, suits and prosecutions conducted with the $500,000 appropriated by the Act, and when the appropriation was expended, the immunity statute would expire. Obviously Appellant does

not seek this result. Its position is that the immunity proviso is subject to some of the limitations of the appropriation provision but not all of them. This is a little like an optical illusion based on angles. The result may depend on which way one looks at it, but it is impossible to look at it both ways at the same time.

Furthermore, the position relied upon by Appellant was, as noted, rejected by this Court less than two years after the statute was adopted. For in *Hale* v. *Henkel, supra,* this Court ruled that the immunity provision applied to grand jury proceedings, and grand jury proceedings are not brought "under the direction of the Attorney General". *Sullivan* v. *United States,* 348 U.S. 170 (1954).

An argument curiously parallel to that made by Appellant here was raised and disposed of by this Court in *Brown* v. *United States,* 359 U.S. 41 (1959). That case involved the immunity provision of 49 U.S.C. 305(d) which constitutes an incorporation by reference into Chapter 2 of Title 49 of the immunity provision in Chapter 1. That section, like the provision in question, consists of two parts. The statute confers upon the Interstate Commerce Commission "the same power to administer oaths, and require by subpena the attendance and testimony of witnesses . . . relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title; and any person subpenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges and immunities . . . as though such matter arose under chapter 1 of this title . . ." Despite the coincidence of the words "any matter under investigation" in the two clauses, when Appellant contended in *Brown,* as Appellant contends here, that the immunity proviso was by inference limited to the investigations authorized by the first half of the section, and did not extend to a grand jury proceeding, this Court declined to read "such" into the statute, and dismissed the con-

tention as one grasping at straws. The same disposition is appropriate here.

2. It is next suggested (Jurisdictional Statement, pp. 8-9) that the lack of a large number of other provisions authorizing immunity for witnesses before Congressional committees makes the provision considered here somewhat suspect. Only one other provision has been enacted, it is suggested, during the last one hundred years. Whether this be so may depend on the interpretation of a number of other statutes (See e.g. the Compulsory Testimony Act of 1893 discussed below), but the congressional intent in enacting 15 U.S.C. 32 must be considered from the vantage point of 1903, not 1963. In 1857 Congress had provided by 11 Stat. 155 an extremely broad immunity which would have run to any witness before any congressional committee. In 1862 this was cut back, 12 Stat. 333, to a provision prohibiting use of testimony before congressional committees in subsequent prosecutions. It was not, however, until the decision of this court in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892) that it became apparent that this provision was not an effective immunity statute. During the next eleven years leading up to the enactment of 15 U.S.C. 32, Congress passed a series of immunity statutes in particular areas, primarily investigations under the commerce and antitrust laws which, as Judge Humphrey's decision in the *Armour* case, *supra*, made clear were at least broad enough to provide for immunity in such investigations as the Congress might authorize. The fact that Congress has had little occasion to enact additional clauses in other areas since that time for the use of its own committees can hardly have a bearing. What is relevant is Congress' intent in 1903, in passing an act after 46 years' experience with what had been thought for 35 of those years to be an effective immunity statute.

3. Appellant suggests (Jurisdictional Statement, pp. 9-10) that the history of 15 U.S.C. 32 is "intimately involved" with that of the Compulsory Testimony Act of 1893 and that this somehow limits the scope of 15 U.S.C. 32. Actually the limitation is illusory. Even if it were true that the 1903 immunity provision was intended to be somehow related to that of 1893, the "plain" limitation to administrative and judicial proceedings which the Appellant finds in the earlier Act is certainly not apparent on its face. That Act, 27 Stat. 443, provided:

> "That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, *or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress,* entitled, 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided,* That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying." (Emphasis supplied)

The limitation which Appellant finds is not apparent and has never been found by any court. The fact that an earlier version of the bill was limited to criminal cases can hardly be persuasive.

In any event the interrelationship between two statutes is certainly less clear than is suggested. The first begins

by denying the availability of the Fifth Amendment privilege and ends with a grant of immunity. The other begins with immunity and leaves the denial of the privilege to inference.

Appellant pictures 15 U.S.C. 32 as the reaction of a shocked Congress to a startling decision in *Foot* v. *Buchanan*, 113 Fed. 156 (C.C.N.D. Miss. 1902). That case did say, as is suggested, that the 1893 Act did not apply to the Sherman Act. This could hardly have startled anyone, however, as a simple reading of the language above would make clear. The court in *Foot* merely stated the proposition in the course of demolishing the suggestion, rather desperately put forward by a district attorney who saw his case slipping from him, that this Court's decision in *Brown* v. *Walker*, 161 U.S. 591 (1896) had overruled *Counselman* v. *Hitchcock, supra*. Apart from the obvious *post hoc* fallacy of the Appellant's argument, there is no history whatever establishing a relationship between the immunity acts of 1893 and of 1903.

III. The Significance of the Question Presented Is Not Sufficiently Substantial to Require Plenary Consideration by This Court.

The Jurisdictional Statement suggests (pages 10-12) that the result of the decision below would be a drastic interference with the conduct of Congressional investigations and with the administration of the antitrust laws. The adverse consequences imagined are, however, entirely chimerical.

The decision below involved a hearing before one subcommittee of one Committee of the House conducting one single investigation for one specifically announced purpose. It had nothing to do with sixteen of the seventeen Congressional Committees listed by Appellant on page 11 of

the Jurisdictional Statement. Whether any of these Committees has or intends to conduct investigations under the antitrust laws raising the issue here is a question not now before this Court, and if they do there should be no more difficulty in recognizing such an investigation than there is in determining whether a particular Grand Jury investigation is within the ambit covered by 15 U.S.C. 32.

Immunity statutes are not generally thought to be a hindrance to investigation. Indeed they are passed for the precise purpose of aiding investigation. In the antitrust field, they make it possible, by compelling testimony from certain individuals involved to uncover evidence against those primarily responsible and corporate offenders. The suggestion that Congressional Committees are not equipped with the ability or discretion to conduct investigations without needlessly conferring immunity on the wrong people is properly addressed to Congress and not to this Court. Appellant's further complaint, that witnesses need not claim their privilege against self incrimination in order to receive immunity, results from the decision of this Court in *United States* v. *Monia*, 317 U.S. 424 (1943) and not from the decision in the court below. This too is subject to adjustment by Congress if the existing arrangements are not satisfactory, but in the past twenty years Congress has not seen fit to make any change. The present rule does not seem to have inhibited the Department of Justice in the conduct of Grand Jury investigations.

The principal complaint of the Appellant appears to be over what it regards as an unwarranted intrusion of Congress into an area the Department of Justice would rather have reserved for itself. This is hardly a matter with which this Court should concern itself. If Congress wishes its Committees to have the power which they now have, it can assign them that power, and if this Court should accede to the Justice Department's plea to take the

power away, Congress can at will return it. If, on the other hand, there is merit to the Department's claim that Congressional committees should not have such power, Congress can readily perform its own function by removing it. The only real significance of this case, therefore, is its importance to the Appellee, who, under compulsion, appeared before a Congressional committee and testified to matters going to the heart of the alleged offense for which he has been indicted. A simple sense of fair play requires that the immunity given him by the statute, which the only available precedent held was applicable, should not now be taken from him.

CONCLUSION

This appeal does not present any substantial question sufficient to require plenary consideration by this Court.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 235

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM C. WELDEN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Memorandum and Order of the district court (R. 38–40) is reported at 215 F. Supp. 656.

JURISDICTION

The indictment was filed under Section 1 of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. 1) and under the Conspiracy Act (18 U.S.C. 371). The judgment of acquittal of appellee Welden (R. 41) was entered on March 27, 1963, upon the district court's grant of appellee's motion to dismiss the indictment on the ground that appellee had obtained immunity from prosecution by virtue of testimony he gave before a congressional committee. Notice

of appeal was filed on April 26, 1963 (R. 45). Probable jurisdiction was noted on October 14, 1963 (R. 48; 375 U.S. 809).

The jurisdiction of this Court to review by direct appeal the judgment of the district court is conferred by the Criminal Appeals Act (18 U.S.C. 3731), since that judgment is one "sustaining a motion in bar, when the defendant has not been put in jeopardy." *United States* v. *Monia*, 317 U.S. 424; *United States* v. *Hoffman*, 335 U.S. 77.

QUESTION PRESENTED

Whether a person who testifies before a congressional subcommittee is testifying in a "proceeding, suit, or prosecution under" the antitrust laws and thereby obtains immunity under the Act of February 25, 1903, from prosecution with respect to any matter concerning which he testifies.

STATUTE INVOLVED

The Act of February 25, 1903, 32 Stat. 854, 904, 15 U.S.C. 32, provides in part:

> • • • no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts [the Interstate Commerce Act, the Sherman Act, and the antitrust provisions of the Wilson Tariff Act[1]]: *Provided further*, That

[1] Sections 73, 74, 75, and 76 of the Act of August 27, 1894, 28 Stat. 509, 570 (15 U.S.C. 8–11).

no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

STATEMENT

Appellee is a member of the senior board of executives of H. P. Hood & Sons, Inc., and is also head of the following three departments of that company: government relations, economic research, and purchasing. On September 6, 1962, an indictment was returned against him, four other individuals and three corporations, including H. P. Hood & Sons, Inc. (R. 14–27).[2] Count One charged the defendants with violating Section 1 of the Sherman Act by conspiring, among other things, to fix prices in the sale of milk in the Greater Boston Area; to allocate among themselves the business of selling milk to designated federal, state, and municipal institutions in Maine, New Hampshire, and Massachusetts; and to engage in collusive bidding for contract awards from these institutions. Count Two charged all three corporations and three of the individuals, including appellee, with a conspiracy to defraud and injure the United States in violation of 18 U.S.C. 371.

Appellee moved to dismiss the indictment on a number of grounds (R. 28–30).[3] One ground was that

[2] The indictment of September 6, 1962, superseded one returned on April 24, 1962, against the same defendants. The April 24th indictment was dismissed by the government, with the consent of the court, on December 5, 1962 (R. 34).

[3] Appellee's motion was addressed to the April 24th indictment, but by stipulation filed on September 25, 1962, the motion was made applicable to the September 6th indictment (R. 35). See *supra*, no. 2.

prosecution was prohibited under the immunity provision of the Act of February 25, 1903 (15 U.S.C. 32) because in February 1960 he had given testimony before a subcommittee of the House Select Committee on Small Business concerning transactions, matters, and things covered by the indictment (R. 30). It is unnecessary to review appellee's testimony before the subcommittee, for no contention is made by the government here, and none was made below, that the testimony did not pertain to matters charged in the indictment.[4]

The district court filed a Memorandum and Order (R. 38–40), upholding appellee's reliance on 15 U.S.C. 32 and rejecting the government's contention that testimony before a congressional committee is not given in a "proceeding * * * under [the antitrust laws]" within the meaning of the immunity provision of the 1903 statute. To hold otherwise, it reasoned, "would fly in the face of traditional American notions of fair play * * * and subject a defendant to stand trial for conduct about which he has been compelled to testify by the subpoena power of a Congressional

[4] Appellee's testimony is set forth in Hearings before the Special Subcommittee of the Select Committee on Small Business, House of Representatives, 86th Cong., 2d Sess., Part IV, pp. 665–700. The hearings, which concerned practices in the distribution of dairy products, are included in the record certified to this Court. The Select Committee had been authorized by the House to study and investigate the problems of all types of small business (H. Res. 51, 86th Cong., 1st Sess., 105 Cong. Rec. 1785) and its chairman appointed the Special Subcommittee to study the problems of small business in the dairy industry (H. Rep. 714, 86th Cong., 1st Sess.).

Subcommittee" (R. 40). The Court concluded that the immunity provision bars appellee's prosecution and dismissed the indictment as to him (R. 41).[5]

ARGUMENT

THE ACT OF FEBRUARY 25, 1903, DOES NOT CONFER IMMUNITY FOR TESTIMONY GIVEN BEFORE A CONGRESSIONAL COMMITTEE

INTRODUCTION AND SUMMARY

The power of Congress to compel testimony is, of course, limited by the Fifth Amendment privilege against self-incrimination which permits a refusal to testify whenever the answer might tend to subject the witness to criminal responsibility. *Quinn* v. *United States,* 349 U.S. 155, 160–161; *McCarthy* v. *Arndstein,* 266 U.S. 34, 40. Therefore, unless Congress conferred upon Welden an "immunity from prosecution coextensive with the constitutional privilege" (*Brown* v. *United States,* 359 U.S. 41, 46; *Ullmann* v. *United States,* 350 U.S. 422; *Brown* v. *Walker,* 161 U.S. 591), he was free to rely upon his Fifth Amendment privilege, and to refuse before the subcommittee to give self-incriminatory testimony. See *e.g., McCarthy* v. *Arndstein,* 266 U.S. 34, 42; *Counselman* v. *Hitchcock,* 142 U.S. 547. It is our contention that Congress has not granted an immunity from prosecution as to mat-

[5] The district court did not pass on appellee's alternative contention that he had obtained immunity as a result of testimony given in a Federal Trade Commission proceeding, although it was specifically requested to do so by the government (R. 43–44).

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ters about which a witness testifies before a congressional committee investigating violations of the antitrust laws. The statute upon which appellee relies in claiming that he was granted such an immunity, the Act of February 25, 1903, applies only to testimony given in certain judicial proceedings.

One of the crucial issues litigated and decided in 1906 in *Hale* v. *Henkel,* 201 U.S. 43, was whether the phrase "proceeding, suit or prosecution" in the antitrust immunity provision enacted in 1903 and now found in 15 U.S.C. 32 was even broad enough to cover all forms of judicial inquiry, including a grand jury proceeding. The Court concluded that (201 U.S. 66):

> While there may be some doubt whether the examination of witnesses before a grand jury is a suit or prosecution, we have no doubt that it is a "proceeding" within the meaning of this proviso. The word should receive as wide a construction as is necessary to protect the witness in his disclosures, *whenever such disclosures are made in pursuance of a judicial inquiry,* whether such inquiry be instituted by a grand jury, or upon the trial of an indictment found by them. [Emphasis added.]

In the present case the district court has held that the scope of 15 U.S.C. 32 is not limited to "disclosures * * * made in pursuance of a judicial inquiry." Although no committee of Congress has, so far as we know, ever asserted the right to compel incriminating testimony by any witness testifying in an investigation of violations of the antitrust laws, the court below has held that the 1903 statute renders any witness before a congressional committee

investigating antitrust violations immune from prosecution for any matter about which he may testify. The witness would thus be denied his right to decline to give otherwise incriminating testimony in reliance upon his Fifth Amendment privilege. This expansion of the scope of 15 U.S.C. 32 is inconsistent with the intent plainly manifested by the words of the statute and disregards a long history of unwillingness by Congress to grant its committees the very powers the district court has found implied in 15 U.S.C. 32.

The plain language of the Act of February 25, 1903 (15 U.S.C. 32) establishes that its scope is limited to judicial proceedings. After referring to the Interstate Commerce Act, the Sherman Act, and part of the Wilson Tariff Act, Congress appropriated $500,000 "to be expended under the direction of the Attorney General * * * to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States." In the succeeding clause the Act provides "that no person shall be prosecuted * * * for * * * any * * * matter * * * concerning which he may testify * * * in any proceeding, suit, or prosecution under said Acts * * *."

Congressional hearings are conducted under the Legislative Reorganization Act of 1946, 60 Stat. 812, rules and regulations adopted by either House, or, as in the instant case, under a special resolution (see note 4, *supra,* p. 4); they have never been considered proceedings "under" such statutes as the Sherman Act. Moreover, the dual reference to proceedings, suits, and prosecutions was meant as an all-inclusive description of those judicial proceedings "in the courts of the United States" which were authorized by the

named statutes. The phrase "proceeding, suit, or prosecution" in the immunity proviso was intended to have the same meaning as the phrase "proceedings, suits, and prosecutions" in the appropriation clause, where the context makes a limitation to judicial proceedings unmistakable. This identity of meaning is confirmed by the very limited legislative history which indicates that Congress intended to give the Attorney General two forms of assistance—a special appropriation and a power to compel incriminatory testimony—to help him conduct the same type of proceedings, suits, and prosecutions under the same statutes.

The plain meaning of the language of the statute is confirmed by the uniform assumption of the courts, the Congress, and the commentators that no immunity provision existed for congressional hearings from 1862 to 1954. This assumption is rooted in a history of extreme reluctance by Congress to grant an immunization power to its committees. In light of this long and clear history Congress cannot be thought to have intended the Act of February 25, 1903, to grant a sweeping and almost unrestricted power of immunization upon its committees when there is not a single suggestion of any such purpose in the legislative history and when the language of the statute so strongly indicates a contrary intent.

A. *The language of the immunity provision plainly indicates that the provision was never intended to apply to testimony given before congressional committees.*

The antitrust immunity provision, now codified as 15 U.S.C. 32, was enacted as part of the general ap-

propriations Act of February 25, 1903, which provided in pertinent part as follows:

> That for the enforcement of the provisions of the [Interstate Commerce] Act * * *, * * * the [Sherman] Act * * * and * * * [the anti-trust provisions of the Wilson Tariff] Act, * * * the sum of five hundred thousand dollars * * * is hereby appropriated, * * * to be expended under the direction of the Attorney General * * * to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States: *Provided,* That no person shall be prosecuted * * * for * * * any * * * matter * * * concerning which he may testify * * * in any proceeding, suit or prosecution under said Acts * * *.[*]

The inapplicability of the 1903 Act to hearings before congressional committees is plain from the language of the statute. The immunity results only from testimony "in any proceeding, suit, or prosecution *under said Acts* * * *" (emphasis added). Hearings of congressional committees are conducted under the Legislative Reorganization Act of 1946, 60 Stat. 812, rules and regulations adopted by either House, or, as in the instant case, under a special resolution (see Note 4, *supra,* p. 4). See *United States* v. *Rumely,* 345 U.S. 41; *Wilkinson* v. *United States,* 365 U.S. 399, 407–409; *United States* v. *Seeger,* 303

[*] The codification of the Act of 1903 at 15 U.S.C. 32 has never been enacted into positive law. It differs from the wording of the original act only in eliminating the appropriation provision of the 1903 statute, thereby making it necessary to refer to the Sherman, Interstate Commerce, and Wilson Tariff Acts by section number rather than merely by reference back to "said Acts."

F. 2d 478, 482–483 (C.A. 2). They have never been considered by Congress to be proceedings "under" the antitrust laws or the Interstate Commerce Act.

This interpretation of the phrase "proceeding, suit or prosecution under said Acts" is confirmed by the meaning of the immediately preceding, virtually identical phrase "proceedings, suits, and prosecutions under said Acts" in the very same sentence of the same statute. In the 1903 Act Congress provided a special appropriation of $500,000 for the enforcement of the Sherman, Interstate Commerce, and Wilson Tariff Acts, "to be expended under the direction of the Attorney General * * * to conduct proceedings, suits, and prosecutions under said Acts in the courts of the United States." In the very next clause Congress then provided immunity for any matter concerning which a person might testify in the type of proceedings for which it had just appropriated $500,000—*i.e.*, "in any proceeding, suit, or prosecution under said Acts * * *." Unless the same phrase was intended to have different meanings in two successive clauses of the same Act, the immunity provision, like the appropriations provision, applied only to proceedings, suits, or prosecutions brought "in the courts of the United States."[7] Congress did not

[7] For the same reason, we submit that the only proceedings, suits, or prosecutions within the scope of the immunity provision are those brought "under the direction of the Attorney General." This would, of course, include grand jury proceedings, at least when brought and conducted "under the direction of the Attorney General." See *Hale* v. *Henkel*, 201 U.S. 43, 46. However, there may be situations in which a witness retains his Fifth Amendment privilege and immunity is not available even in

repeat the phrase "in the courts of the United States" in stating the immunity provision because the statute obviously refers to the same "proceedings, suits, and prosecutions" in the two adjoining clauses of the same sentence. In sum, Congress used the words "proceeding," "suit," and "prosecution," both in the singular and the plural, as an all-inclusive description of those proceedings "in the courts of the United States" which were authorized "under [the] Acts" for the enforcement of which $500,000 was appropriated.[8] It is only for testimony in these judicial "proceedings, suits, and prosecutions" conducted "in the courts of the United States" that the 1903 statute grants an immunity. See *Hale* v. *Henkel,* 201 U.S. 43, 66, *supra,* p. 6.

That the immunity was intended only for testimony given in those proceedings "in the courts of the United States" for which the appropriation was made is confirmed by legislative history showing that Con-

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proceedings brought by the Attorney General. See *United States* v. *Standard Sanitary Mfg. Co.*, 187 Fed. 232 (E.D. Pa.).

[8] The "Acts" to which the immunity proviso refers are the Interstate Commerce Act, the Sherman Act, and the antitrust provisions of the Wilson Tariff Act. These statutes authorize a variety of judicial proceedings to enforce the several remedies for which they provide, including (1) criminal prosecutions and grand jury proceedings for violations (Sherman Act, §§ 1 and 2; Wilson Tariff Act, § 73; § 10 of the Interstate Commerce Act, as amended by the Act of March 2, 1889, 25 Stat. 857; Elkins Act, § 1, 32 Stat. 847); (2) suits in equity to enjoin violations (Sherman Act, § 4; Wilson Tariff Act, § 74; § 16 of the Interstate Commerce Act, as amended by 25 Stat. 859; Elkins Act, § 3); and (3) forfeiture proceedings (Sherman Act, § 6; Wilson Tariff Act, § 76).

gress in the 1903 Act intended to provide the Attorney General with dual enforcement weapons: (1) a special, additional appropriation, and (2) the power to compel incriminating testimony. Congressman Hepburn, who had introduced a bill providing immunity in proceedings under the antitrust laws (H.R. 15383, 57th Cong., 2d Sess.; 36 Cong. Rec. 5), sponsored an amendment to the appropriations bill covering the Department of Justice which contained both a special appropriation and an immunity provision. He explained that his amendment was preferable to another proposed amendment providing only for a special appropriation (36 Cong. Rec. 411) because his proposal "gives an added probability of conviction, for without the language here used we might have difficulty in the way of prosecutions" (*id.* at 412). One difficulty he mentions is that the public prosecutor does not "have the means of marshaling and procuring testimony" (*ibid.*). His substitute would, in his view, enable the Attorney General "to secure the very best of legal talent, and then reenforce * * * [them] by placing at their disposal the means of securing the necessary proof" (*ibid.*).

These statements by the sponsor of the amendment which, so far as we are aware, are the only relevant contemporaneous statements, confirm what the wording of the immunity provision, when read alone or in context, makes clear—that immunity was intended to be conferred only for testimony given in the type of proceedings for which Congress was granting a special appropriation, *i.e.*, for testimony in judicial proceedings conducted "in the courts of the United States" under the named statutes. There

is no indication in the legislative history that the immunity provision was ever intended to be applicable to a hearing before a Congressional committee.[9]

B. The inapplicability of the immunity provision of the 1903 Act to congressional hearings is confirmed by the traditional unwillingness of Congress to confer a power to grant immunity upon its committees and by the assumption of courts, Congress, and commentators that no such power existed between 1862 and 1954.

1. This interpretation of the 1903 Act, which we submit is compelled by its language, is alone consistent with the uniform assumption of the courts, the Congress, and the commentators that from 1862 to 1954 no committee of Congress had power to grant immunity from prosecution and therefore that none could compel a witness before it to testify over his objection on grounds of self-incrimination. *Bart* v. *United States*, 203 F. 2d 45, 48 (C.A.D.C.), reversed on other grounds, 349 U.S. 219; *Carlson* v. *United States*, 209 F. 2d 209, 212 (C.A. 1); H. Rep. 2606, 83d Cong., 2d Sess., pp. 5–7; *id.*, pp. 11–12 (minority views); S. Rep. 153, 83d Cong., 1st Sess., p. 2; Dixon, *The Doctrine of Separation of Powers and Federal Immunity Statutes*, 23 Geo. Wash. L. Rev. 501, 503–509 (1955); Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 Geo. Wash. L. Rev. 447, 466–467 (1953–54); Brown, *Immunity for Witnesses in Congressional Hearings*, 1 U.C.L.A. L. Rev. 183, 186–190 (1953–54); Boudin, *The Immunity Bill*, 42 Geo. L. J. 497; 507–510 (1953–54); Liacos,

[9] There was no discussion of the immunity provision in the Senate (36 Cong. Rec. 989–990).

Rights of Witnesses before Congressional Committees, 33 B.U. L. Rev. 337, 378 (1953); Note, *Self-incrimination and Federal Anti-Communist Measures*, 51 Col. L. Rev. 206, 213 (1951); and Note, *Applicability of Privilege Against Self-incrimination to Legislative Investigations*, 49 Col. L. Rev. 87, 94–96 (1949). Indeed, other than the decision below, we are not aware of a single case which has held the immunity provision in any of the many regulatory statutes enacted during this period (see Appendix *infra*, p. 22) to be applicable to a hearing before a congressional committee. See Note, *The Federal Witness Immunity Acts*, 72 Yale L. J. 1568, 1595, n. 122.[10]

This uniform assumption is rooted in a history which shows extreme reluctance by Congress to grant immunity for testimony at congressional hearings. The earliest immunity statute was the Act of January 24, 1857, 11 Stat. 155, which related explicitly and exclusively to testimony before either House of Congress and

[10] In the court below appellee relied upon an oral opinion of a district court in *United States* v. *Armour & Co.*, 142 Fed. 808 (N.D. Ill.), a case also cited by the court below (R. 40). This opinion was almost entirely devoted to consideration of the scope of a wholly separate immunity provision in a 1903 statute creating a Commissioner of Corporations. § 6, Act of February 14, 1903, 32 Stat. 827–828. It neither involves nor considers the applicability of the immunity provisions of the Act of February 25, 1903, the statute here involved, to investigations before a congressional committee although, in dictum (at 826), the district court did state—we believe erroneously—that these antitrust immunity provisions would apply to a proceeding before the Commissioner of Corporations.

their committees—not to court proceedings."[11] Section 2 provided in part that:

> * * * no person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice, or subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify before either House of Congress or any committee of either House * * *.

Experience under this broad immunity provision soon led Congress to amend it. Because of testimony before congressional committees, indictments were quashed in two highly publicized cases, in circumstances where the propriety or need for the testimony was questioned.[12] Congress reacted by passing the Act of January 24, 1862, 12 Stat. 333, which amended Section 2 so as to protect the witness only from use of the testimony against him, not from prosecution.

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[11] The event which led to the enactment of the 1857 statute was a strongly-worded editorial in the New York Times charging that members of the House of Representatives had sold or offered to sell their votes on pending measures (Cong. Globe, 34th Cong., 3d Sess., p. 274). A House committee appointed by the Speaker to investigate, reported that a correspondent of the Times, after stating that members of Congress had offered to sell their votes through him, refused to disclose their names (*id.*, at 403–404). One purpose in passing the statute was "to remove the obstacle to the investigation of parliamentary corruption * * *" (*id.*, at 427). See Eberling, *Congressional Investigations* (1928), pp. 150–154, 302–316.

[12] One case involved a former Secretary of War, and the other, a government employee who "purloined two millions in bonds from the Interior Department * * *." Cong. Globe, 37th Cong., 2d Sess., 428; *id.*, 57, 228, 364.

See, Eberlihg, *Congressional Investigations* (1928), pp. 150–154, 302–316, 320–324.

In 1876, another incident prompted efforts to restore the broader immunity provisions of the 1857 Act. In connection with contemplated impeachment proceedings against Secretary of War Belknap, the House Committee on the Judiciary wished to make certain that the testimony of the chief witness in support of the charges would be made available (4 Cong. Rec. 1564–1572). Accordingly, it recommended the passage of a bill (H.R. 2572, 44th Cong., 1st Sess.), which was in substance a re-enactment of Section 2 of the 1857 Act. See 4 Cong. Rec. 1564. The bill passed the House (4 Cong. Rec. 1571), but died in the Senate. The lengthy adverse report of the Senate Committee on the Judiciary (S. Rep. 253, 44th Cong., 1st Sess.) emphasized that to give the immunization power to committees of Congress would open the door to many abuses and would more often hurt than help the cause of justice (*id.*, at pp. 1, 7). The report recalled the experience under Section 2 of the 1857 Act (*id.*, at pp. 8–10), which "had come to be a crying and notorious evil" and "was repealed by the unanimous vote of both houses of Congress" (*id.*, at 9). See, Eberling, *supra*, pp. 336–339.

In light of this history of Congress' extreme concern for the possibilities of abuse of an immunity power by congressional committees, it is fair to conclude that, had Congress intended in some later statute to empower its committees to grant immunity from prosecution, it would have done so explicitly as it

did in 1857 and its intent would have been manifest in the legislative history. Yet between 1862 and 1954 Congress enacted no immunity legislation applicable in its terms to hearings before its committees.[13] More particularly, it is extremely unlikely that Congress intended to depart from its traditional reluctance to grant an immunization power to its committees with a statute such as the 1903 Act, the language and legislative history of which fail to reveal even the slightest indication that the Act might be applied to testimony before a congressional committee.

This conclusion is underscored by the nature of Congress' action in 1954 when it enacted, for the first time since 1862, a statute which, by its terms, confers immunity for certain testimony given before a congressional committee. In the Immunity Act of 1954, 68 Stat. 745 (18 U.S.C. 3486), after full debate,[14] Congress explicitly provided for immunity for testimony given before a congressional committee, but only under carefully circumscribed conditions. The statute provides that, in an investigation concerning

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[13] A brief history of immunity legislation enacted between 1862 and 1954 but not conferring immunity for congressional hearings is set forth in the Appendix, *infra* pp. 22–23.

[14] In connection with the passage of the 1954 Act, the attention of Congress was again invited to the possibility of abuse of the immunization power, experience under the 1857 Act was recalled, and reference was made to the adverse Senate report on the 1876 proposal to broaden the immunity powers of congressional committees. It was taken for granted that no immunity provision had existed since 1862 for testimony at a congressional hearing. H. Rep. 2606, 83d Cong., 2d Sess., pp. 5–7, 7–8; *id.*, Minority Report, pp. 11–14; S. Rep. 153, 83d Cong., 1st Sess.; *id.*, Part 2.

national defense or security, no witness shall be excused from testifying or producing evidence "before either House, or before any committee of either House, or before any joint committee of the two Houses of Congress" under a claim of self-incrimination and the witness shall be granted a corresponding immunity, but only if: (a) the witness has claimed his privilege against self-incrimination, (b) a two-thirds vote of the full committee has affimatively authorized the grant of immunity, (c) an order of a federal district court has been entered in the record requiring the witness to give evidence, and (d) the Attorney General has been notified of the proposed grant of immunity and has been given an opportunity to be heard in the district court with respect to each application for an order to compel testimony.

To recapitulate: (1) The experience of Congress under the broad immunity provision of the 1857 Act had been so unsatisfactory that Congress repealed it five years later and refused to reinstate it in 1876; (2) between 1862 and 1954, it was generally accepted that no congressional committee could grant immunity; and (3) when Congress in 1954 again did provide an immunity for proceedings before congressional committees, it did so only after the most careful consideration, explicitly referred to such committees, and imposed detailed restrictions upon the grant. In these circumstances, it would run counter to a century of congressional history to read the grant of immunity in the 1903 Act for testimony given "in any proceeding, suit or prosecution under [the anti-trust] Acts," as covering testimony before a congressional committee.

2. There are sound policy considerations why the immunity provisions of the 1903 Act should not by implication be construed to apply to congressional proceedings. The hearings of a great number and variety of congressional committees and subcommittees frequently involve questions bearing upon the subject matters regulated by the Sherman, the Interstate Commerce, and the Wilson Tariff Acts. Under the district court's decision, a hearing touching on any of these laws would be a "proceeding" covered by the immunity provision. Thus, the intent attributed to Congress by the district court would be to empower many committees or subcommittees to compel incriminatory testimony and to confer a broad immunity from all criminal prosecution with respect to any matter concerning which testimony is given, including prosecution with respect to matters touching on national security or defense. And such immunity could be conferred without alerting the committee (for the privilege need not be claimed), without a vote by the committee, without a court order, without notification of the Attorney General, without, in short, any of the procedural safeguards which Congress has provided in the case of committees investigating national security and defense. All this could be done, under the district court's decision, merely by the taking of testimony pursuant to a subpoena.

The decision below thus poses the following dilemma: (1) If congressional committees continue their present practice of summoning and questioning all witnesses whose testimony they deem pertinent,

and who have not asserted a claim that their testimony would be self-incriminatory, the result will be a widespread grant of immunity from criminal prosecution, (2) if congressional committees, because of their concern over possible immunity resulting from a witness's appearance, severely limit the scope of their questioning, the effectiveness of congressional investigations as an important element of the legislative process would be seriously impaired. Either of these consequences would be damaging to the public interest. Certainly, such a construction should be avoided unless compelled. Here, as we have argued, the statutory language and history demonstrate that it is the contrary construction which is compelling.[15]

[15] The district court's observation (R. 40) that it would contravene "traditional American notions of fair play" to require "a defendant to stand trial for conduct about which he has been compelled to testify by the subpoena power of a Congressional Subcommittee" is far wide of the mark. The district court failed to recognize the basic distinction between the power of Congress to compel testimony generally and to compel incriminating testimony. A witness summoned to testify can fully protect himself against giving incriminating testimony—and it is only the compulsory production of such testimony that might be unfair—by claiming his privilege. Appellee could not have been compelled by the subcommittee to give incriminating testimony.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.[16]

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

ROBERT B. HUMMEL,
IRWIN A. SEIBEL,
Attorneys.

DECEMBER 1963.

[16] In place of the Solicitor General, who has disqualified himself for personal reasons.

APPENDIX

The following is a brief history of immunity legislation enacted between 1862 and 1954:

In 1868, Congress passed the first immunity statute relating to judicial proceedings. Act of February 25, 1868, 15 Stat. 37. This Act, like the amended 1857 Act dealing with congressional hearings, did not grant immunity from prosecution, but provided that evidence obtained from a party or witness could not subsequently be used against him in a criminal proceeding. The original Interstate Commerce Act of 1887 (24 Stat. 379, 383), which contained an immunity provision in the same form, related only to proceedings before the Interstate Commerce Commission. Following this Court's holding in *Counselman* v. *Hitchcock,* 142 U.S. 547, that such form of immunity was inadequate to compel incriminatory testimony because the witness was still subject to prosecution, Congress passed the Compulsory Testimony Act of February 11, 1893, 27 Stat. 443 (49 U.S.C. 46). That Act granted immunity from prosecution, but related only to proceedings under the Interstate Commerce Act.

In February 1903, similar immunity provisions were included in three additional statutes, one of which is the statute containing the provision here involved. The others were: (1) the Act of February 14, 1903, 32 Stat. 825, 827, which established the Department of Commerce and Labor, gave the Commissioner of Corporations the same investigatory powers as the Interstate Commerce Commission, and specifically incorporated by reference the immunity provisions

of the 1893 Act; and (2) the Elkins amendment to the Interstate Commerce Act, adopted February 19, 1903, 32 Stat. 847, 848, in which the immunity provisions were also restated verbatim.

Thereafter, as the scope of federal regulation expanded, Congress routinely included in almost every major regulatory statute an immunity provision relating to proceedings under that statute. See *United States* v. *Monia*, 317 U.S. 424, 434–435, 442–443 (dissenting opinion); Lilienthal, *The Power of Governmental Agencies to Compel Testimony*, 39 Harv. L. Rev. 694, 697–698 (1925–1926); Note, *The Federal Witness Immunity Acts*, 72 Yale L. J. 1568, 1571–1576 (1963).

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No. 235

In The
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UNITED STATES OF AMERICA, *Appellant*

v.

WILLIAM C. WELDEN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR WILLIAM C. WELDEN, Appellee

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INDEX

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Opinion Below

The Memorandum and Order of the District Court (R. 38-40) are reported at 215 F. Supp. 656.

Jurisdiction

Probable jurisdiction was noted on October 14, 1963 (R. 48; 375 U.S. 809).

Question Presented

Whether the appellee who, in obedience to a subpoena, appeared before a congressional subcommittee investigating alleged violations of the antitrust laws and gave testimony under oath substantially connected with the offenses charged in the present indictment obtained immunity from prosecution for these offenses, although he did not claim his privilege against self-incrimination.

Statutes Involved

The Act of February 25, 1903[1], 32 Stat. 854, 904, 15 U.S.C. 32, provides in part:

> . . . no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts [the Interstate Commerce Act, the Sherman Act, and the antitrust provisions of the Wilson Tariff Act and all Acts amendatory thereof or supplemental thereto]: *Provided, further*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

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[1] "An Act making appropriations for the legislative, executive and judicial expenses of the Government for the fiscal year ending June 30, 1904, and for other purposes."

The Act of June 30, 1906[3], 34 Stat. 798, 15 U.S.C. 33, provides in pertinent part:

> "Under the immunity provisions [of the above Act and others] immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."

Statement of the Case

Appellee was indicted together with four other individuals and three corporations including appellee's employer H. P. Hood & Sons, Inc. in a two count indictment (R. 14-27). Count One charged the defendants with violating Section 1 of the Sherman Act by conspiring, among other things, to fix prices in the sale of milk in the Greater Boston Area; to allocate among themselves the business of selling milk to designated federal, state and municipal institutions in Maine, New Hampshire and Massachusetts; and to engage in collusive bidding for contract awards from these institutions. Count Two charged all three corporations and three of the individuals, including appellee, with a conspiracy to defraud and injure the United States in violation of 18 U.S.C. 371.

Prior to the convening of the Grand Jury and the return of the indictment appellee was subpoenaed to appear before a Special Subcommittee of the Select Committee on Small Business of the House of Representatives, 86th Congress,

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[3] "An Act defining the right of immunity of witnesses under . . . the act entitled 'an Act making appropriations for the legislative, executive and judicial expenses of the Government for the fiscal year ending June 30, 1904, and for other purposes.'"

2d Session, pursuant to H. Res. 51[3], and to testify touching matters of inquiry committed to the Committee.[4] (R. 14, 38-40).

In opening the hearings, the chairman announced that: "The purpose of these hearings is to receive testimony about attempts of large distributors of dairy products in the New England area to destroy small competitors and gain control over prices and markets."[5] (R. 40). Appellee was among the last of some thirty witnesses who appeared before the Committee and one of twenty such witnesses who testified under oath.[5] He was interrogated at considerable length by members of the Committee and its counsel as to the nature of his activities on behalf of his employer and as to the price policy of the company. (R. 39). Testimony was elicited about the economic practices, price changes,

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[3] H. Res. 51 authorized the Select Committee ". . . to conduct studies and investigations of the problems of all types of small business, existing, arising, or that may arise, with particular reference to (1) the factors which have impeded or may impede the normal operations, growth, and development of the potentialities thereof; (2) the administration of Federal laws relating specifically to small business to determine whether such laws and their administration adequately serve the needs of small business; (3) whether Government agencies adequately serve and give due consideration to the problems of small business; and (4) to study and investigate problems of small business enterprises generally, and to obtain all facts possible in relation thereto which would not only be of public interest but which would aid the Congress in enacting remedial legislation . . . . ." H. Res. 51, 86th Cong., 1st Sess., 105 Cong. Rec. 1785.

Its chairman appointed the Special Subcommittee to inquire into and study the problems of small business in the dairy industry. H. Rep. No. 714, 86th Cong., 1st Sess.

[4] The "Hearings before the Special Subcommittee of the Select Committee on Small Business, House of Representatives, 86th Cong., 2d Sess., Part IV, pp. 363-736" are included in the record certified to this Court.

[5] *Ibid.*

and policies of the company, and the competitive situation in the Greater Boston milk market, and about meetings between himself and representatives of competitors of his employer, of which the Committee had previously received complaints and taken testimony. (R. 39-40).

After the return of the indictment appellee moved to dismiss the indictment on the ground that he was being prosecuted for and on account of transactions, matters and things concerning which he had so given testimony, which prosecution was prohibited under the provisions of the Act of February 25, 1903 (15 U.S.C. 32) (R. 28-32). There was no contention by the appellant below (nor is there here) that the testimony given by the appellee did not directly pertain to matters charged in the indictment or that the Congressional Subcommittee was not investigating violations of the antitrust laws. (Appellant's Brief, pp. 4-6).

The district court in its Memorandum and Order allowing the appellee's motion rejected the appellant's argument that the word "proceeding" as appearing in 15 U.S.C. 32 was a technical word containing a "judicial nexus" and not applicable to Congressional hearings, and held that to so construe the statute would "fly in the face of traditional notions of fair play and subject a defendant to stand trial for conduct about which he has been compelled to testify." It also declined to accept the further contention of the appellant that the hearings were not conducted under the antitrust laws. Quoting the Subcommittee Chairman that the hearings concerned "alleged attempts of large distributors of dairy products in the New England area to destroy small competitors and gain control over prices and market," the court found that, "The hearings were clearly within the ambit of the immunity statute" and dismissed the indictment as to the appellee. (R. 38-41).

Argument

THE COURT BELOW CORRECTLY RULED THAT APPELLEE WHO, IN OBEDIENCE TO A SUBPOENA, APPEARED BEFORE A CONGRESSIONAL SUBCOMMITTEE INVESTIGATING ALLEGED VIOLATIONS OF THE ANTITRUST LAWS AND GAVE TESTIMONY UNDER OATH SUBSTANTIALLY CONNECTED WITH THE OFFENSES CHARGED IN THE PRESENT INDICTMENT OBTAINED IMMUNITY FROM PROSECUTION FOR THESE OFFENSES, ALTHOUGH HE DID NOT CLAIM HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

A. The claim of the privilege against self-incrimination is not a prerequisite to acquiring immunity under the Act of February 25, 1903.

The Act of February 25, 1903, *supra*, is an automatic act of immunity requiring no claim of privilege against self-incrimination. *United States* v. *Monia*, 317 U.S. 424.

Indeed, as is stated in *Shapiro* v. *United States*, 335 U.S. 1, 21, n. 27

> "The precise holding in *Monia* was that a witness before an investigatory body need not claim his privilege as a prerequisite to earning immunity under a pre-1933 statute which offered immunity without any reference to the need for making such a claim .... And it was emphasized that, to construe congressional intention otherwise in those circumstances, might well result in entrapment of witnesses as to testimony concededly privileged."

Thus an absence of a claim by the appellee of his privilege against self-incrimination did not destroy the immunity.

B. The Act of February 25, 1903 as supplemented by the Act of June 30, 1906 is plain in its terms and, on its face means to the layman that if he is subpoenaed, and sworn, and testifies, he is to have immunity.

The immunity does not of course extend to prosecution of crimes with which the matters testified to were but remotely connected. *Heike* v. *United States*, 227 U.S. 131. But this is not in issue here.

The appellant's contention that the statute does not reach beyond a judicial proceeding under the auspices of the Attorney General, and hence is not applicable here, is grounded on a technical construction of the word "proceeding" as it appears in the act and on what it terms a "plain reading" of the language of the Act of February 25, 1903 *supra*. As to the first of these points, its reliance is on *Hale* v. *Henkel*, 201 U.S. 43. This is indeed in contrast to appellant's stand in *Hale* v. *Henkel* itself, where it successfully urged this Court to hold that the word "proceeding", as used in the Act was not to receive a narrow or technical construction, but was broad enough to include *at least* an inquiry by a Grand Jury. As to the second point, the appellant in reviewing the "plain language" of the Act of February 25, 1903 completely passes over the Amendment to that Act, (Act of June 30, 1906 supra) wherein the Congress sought, in the light of earlier judicial construction, to declare its prior intent and define the right to immunity of witnesses under the Act. The appellant's arguments were thus put to rest long before they were made.

Early in 1906 a Federal District Court Judge in *United States* v. *Armour & Co.*, 142 Fed. 808 (D.N.D. Ill.) with the decision in *Hale* v. *Henkel* before him, held that the statutory immunity extended to witnesses who had appeared before the Commissioner of Corporations, an official of the Department of Commerce, who was conducting an investigation of the "Beef Trust" pursuant to a resolution of the

House of Representatives,[6] and who admittedly was in no way connected with the Attorney General. Two separate immunity provisions were in issue. One was Section 6 of the Commerce and Labor Act of 1903, 32 Stat. 827, which specifically made applicable to the Commissioner of Corporations the Compulsory Testimony Act of 1893, 27 Stat. 443. The second was the Act here in question, the immunity provision of the Act of February 25, 1903, *supra*.

With respect to the former Act, it was urged by the government that this statute did not apply because the witnesses had not been compelled by subpoena nor sworn. Judge Humphrey, while rejecting that contention on the ground that the necessary degree of compulsion was present in any event, turned to the unconditional immunity statute of February 25, 1903, where neither subpoena, oath, nor testimonial compulsion was a prerequisite, and held that the defendants were entitled to immunity under this Act.

> "If it shall be said that the act of February 14, 1903, establishing the Department of Commerce and Labor, allows immunity to the witness only upon the conditions

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[6] *The Martin Resolution:* "Resolved, that the Secretary of Commerce and Labor be, and he is hereby, requested to investigate the causes of the low prices of beef cattle in the United States since July 1, 1903, and the alleged unusually large margins between the prices of beef cattle and the selling prices of fresh beef, and whether the said conditions have resulted in whole or in part from any contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several States and Territories or with foreign countries; also, whether said prices have been manipulated in whole or in part by any corporation, joint stock company, or corporate combination engaged in commerce among the several States or with foreign nations; and if so, to investigate the organization, capitalization, profits, conduct, and management of the business of such corporations, companies, and corporate combinations, and to make early report of his findings according to law." H. Res. 203, 58th Cong., 2d Sess.

urged by the government, viz., that he shall have resisted until regularly subpoenaed and sworn, no such contention can fairly be made as to the immunity clause of the act of February 25, 1903. The records shows, and it is not disputed, that material evidence was procured by Garfield from the defendants upon the subject of an unlawful combination . . . . It is contended that as to all such evidence the defendants are entitled to immunity under the independent and unconditional act of February 25, 1903, and I am of opinion that they are so entitled." 142 Fed. at 826.

The immediate congressional and executive reaction to the decision of Judge Humphrey demonstrates that it did not lie hidden under a bushel. What was upsetting, however, was not the holding that the immunity provided under the Act of February 25, 1903 was available in an investigatory proceeding outside of the courts but that the decision appeared to mean that the immunity might extend to a witness who was, in effect, a volunteer. The case became a national *cause celebre*[7]. A request for corrective legislation was promptly made by Attorney General Moody and incorporated into President Roosevelt's message to Congress on April 18, 1906. H.R. Doc. No. 706, 59th Cong. 1st Sess.

The floor debates that followed in Congress on the bill sponsored by Senator Knox[8] which was drafted by the De-

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[7]Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 Geo. Wash. L. Rev. 447, 459 (1954).

[8]"*A bill (S. 5769) to declare the true intent and meaning of parts of* the act entitled 'An act in relation to testimony before the Interstate Commerce Commission', and so forth, approved February 11, 1893, and an act entitled 'An act to establish the Department of Commerce and Labor' approved February 14, 1903, and an act entitled 'An act to further regulate commerce with foreign nations and among the States,' approved February 19, 1903, and *an act entitled 'An act making appropriations for the legislative, executive and judicial expenses of the Government for the fiscal year ending June 30, 1904, and for other purposes,' approved February 25, 1903.*" 40 Cong. Rec. 7657. (Italics added.)

partment of Justice leaves no doubt that the Congress was fully aware of the construction placed on the immunity statutes by the district court[9]. The bill, as was related to the House by Congressman Littlefield who conveyed the comment of the Attorney General, sought to establish a definite standard under which future immunity would be granted witnesses.[10]

> Mr. Mann: Now, if we pass a law providing that nobody shall have immunity from prosecution unless called as a witness, how are we going to obtain our information before we commence our prosecution?
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> Mr. Littlefield: There is no trouble at all, so far as the Interstate Commerce Commission is concerned, or the Department of Commerce and Labor, or the Commissioner of Corporations. Each of them has power to summon witnesses, although no case is pending. They have the power under the statute to compel the attendance of witnesses. Of course, if they make an inquiry, and the party inquired of does not see fit to testify unless he is formally summoned and gives testimony on oath, it would establish a legal standard that would protect him and place the Government in a position where they would know what they were doing. He would have a perfect right to insist on that formality being observed. Now, the Attorney-General is of the opinion that under the existing conditions immunity is granted under a great many circumstances when neither party perhaps expected any such result to follow. I make no criticism whatever upon the decision of the judge in Chicago, but the Attorney-General is very firmly of the opinion that the Department of Justice is bound to be very seriously embarrassed in the enforcement of this legislation unless this definite and specific standard is established by Congress.

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[9] 40 Cong. Rec. 7657-58, 8738-40.

[10] Id. at 8738-39.

Perhaps I ought to say that, in my judgment, the legislation upon which Judge Humphrey largely based his ruling was not the act relating to interstate commerce, under which the Interstate Commerce Commission acts, nor the act creating the Bureau of Corporations, under which the Commissioner of Corporations acts, but probably the resolution appropriating $500,000, which contained a very broad and loosely drawn provision in relation to immunity. I am not authorized to say upon what the judge based his decision; but having read what he did say, it is rather my judgment that he was controlled in his conclusion very largely by the language contained in that appropriation, which was, in my judgment, very much broader than is found in the interstate-commerce act or in the act creating the Department of Commerce and Labor.

Now, I can see no practical difficulty. The Attorney-General sees none. The Interstate Commerce Commission, as I understand it, does not apprehend any, and the Commissioner of Corporations does not apprehend any, provided we have this definite legal standard, so that the Government shall know when it confers immunity, and so that the people who give this testimony or appear in court or produce written evidence shall know when they are entitled to immunity. Under existing conditions it is a very uncertain and doubtful proposition.[11]

The result was the enactment of June 30, 1906[12], 34 Stat. 798 which is now codified as 15 U.S.C. 33. The only change

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[11] Ibid.

[12] "*An act defining the right to immunity of witnesses under* the act entitled 'An act in relation to testimony before the Interstate Commerce Commission,' and so forth, approved February 11, 1893, and an act entitled 'An act to establish the Department of Commerce and Labor,' approved February 14, 1903, and an act entitled 'An act to further regulate commerce with foreign nations and among the States,' approved February 19, 1903, and *an act entitled, 'An act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1904, and for other purposes,' approved February 25, 1903.*" (Italics added.)

which the Congress saw fit to make in the Act of February 25, 1903, with the *Armour* decision directly before it, was to impose a requirement that henceforth the testimony be given pursuant to a subpoena and under oath.

This Court in *United States* v. *Monia*, which to our knowledge is the most recent pronouncement of this Court on the construction of this legislation (the Act of February 25, 1903 (15 U.S.C. 32) and the Act of June 30, 1906 (15 U.S.C. 33)), stated:

> "In 1906 the District Court for the Northern District of Illinois held, in *United States* v. *Armour & Co.*, 142 F. 808, that a voluntary appearance, and the furnishing of testimony and information without subpoena, operated to confer immunity from prosecution under the Sherman Act. The court held that the immunity conferred was broader than the privilege given by the Fifth Amendment. The decision attracted public interest since, if it stood, one could immunize himself from prosecution by volunteering information to investigatory bodies. Congress promptly adopted the Act of June 30, 1906, *supra*, providing that the immunity should only extend to a natural person who, in obedience to a subpoena, testified or produced evidence under oath. The Congressional Record shows that the sole purpose of the bill was exactly what its language states. Senator Knox, who sponsored the bill, stated: 'Mr. President, the purpose of this bill is clear, and its range is not very broad. It is not intended to cover all disputed provisions as to the rights of witnesses under any circumstances, except those enumerated in the bill itself.'
>
> "It is evident that Congress, by the earlier legislation, had opened the door to a practice whereby the Government might be trapped into conferring unintended immunity by witnesses volunteering to testify. The amendment was thought, as the Congressional Record demonstrates, to be sufficient to protect the Government's interests by preventing immunity unless the prosecuting officer, or other Government official concerned, should

compel the witness' attendance by subpoena and have him sworn." 317 U.S. at 428-429.

The import of the district court's ruling, followed by the congressional review and adoption of the Act of June 30, 1906, *supra*, amending the Act of February 25, 1903, *supra*, and as set forth by this Court in *Monia* is plain. The immunity conferred by 15 U.S.C. 32 extends to a proceeding conducted by an investigatory body inquiring into antitrust violations, not under control of the Attorney General, but acting pursuant to the authorization of a resolution of Congress.

The parallel to the situation in the case at bar is precise, except that Congress, as is its current practice, elected to have the instant investigatory proceeding conducted by one of its committees rather than delegate the task to another government official.

It is apparent from the foregoing that the immunity conferring power under the Act of February 25, 1903, *supra*, is held by those governmental bodies that have authority to conduct inquiries and investigations within the antitrust field, and which have the power of subpoena and the authority to exact testimony under oath in such proceedings.

Congress, of course, itself or through its committees, in aid of its legislative function has power to investigate and to compel testimony, *Quinn* v. *United States*, 349 U.S. 155, 160-161, even if such proceedings might disclose crime or wrongdoing, *McGrain* v. *Dougherty*, 273 U.S. 135, 179-180, and even if the disclosures sought to be elicited may also be used in criminal prosecutions. *Sinclair* v. *United States*, 279 U.S. 263, 295.

Here, the appellee was subpoenaed to appear before the Special Subcommittee of the Select Committee which was investigating antitrust violations and inquiring into matters now charged in the indictment. In obedience to the subpoena the appellee appeared and gave testimony under oath substantially connected with such matters charged in the indictment. Clearly the appellee acquired immunity under the Act from this prosecution.

C. *The history of immunity legislation is not in conflict with the decision below.*

There is nothing in the legislative history of the Act of February 25, 1903 that lends any affirmative support to the appellant's position. As one commentator has stated:

> "The debate in the House made little reference to the immunity measure; it consisted almost entirely of partisan statements alleging that one party or the other had the greatest interest in enforcing the antitrust laws. 36 Cong. Rec. 411-19 (1902). There was no discussion of the immunity bill on the floor of the Senate. *Id.* at 989-90." *The Federal Witness Immunity Acts*, 72 Yale L.J. 1568, 1575, n. 33 (1963).

There is not a word in the legislative history to the effect that this immunity proviso was considered to be the sole prerogative of the Attorney General.[13]

The attempt to use the decision in *Hale v. Henkel*, 201 U.S. 43 for an alternative ruling that the immunity provision is limited to "judicial" proceedings, is equally unavailing. This Court merely held that the provision was available *at least* in a Grand Jury investigation and did not there decide the question which was not before it, whether

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[13] 36 Cong. Rec. 411-19, 989-90.

it would apply to investigations conducted by other bodies. The language of this Court in the opinions in *Monia*[14] and *Shapiro*[15] cited above indicates that this Court has never ruled that there is any such limitation.

The appellant's further contention that some significance can be drawn from the absence (which it terms "unwillingness") in congressional enactments of specific immunity provisions for its own committees is chimerical. The first immunity act, passed in 1857[16], related to congressional investigations and only congressional investigations. It was not until 1868 that Congress passed an act which permitted in certain circumstances an immunity that reached to the realm of the Attorney General.[17] In 1892 this Court held, in *Counselman* v. *Hitchcock*, 142 U.S. 547, that this immunity provision was insufficient to negate the Fifth Amendment rights of a witness, and that by implication, the similar limited provision applicable to congressional committees was also inadequate. But until that decision, which was strenuously opposed by the Attorney General, congressional committees had what was thought to be an adequate immunity provision.

In the period which followed, Congress abandoned its former blanket immunity approach and enacted a number of provisions, which were limited to specific areas of investigation. While many of these were primarily directed to specific regulatory bodies, and not directly to either congressional committees or the Attorney General, at least one of them, the Act of February 25, 1903, *supra*, was specifi-

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[14] 317 U.S. 424, *supra*.
[15] 335 U.S. 1, *supra*.
[16] 11 Stat. 156 (1857).
[17] 15 Stat. 37 (1868).

cally held in *Armour*[11] to be applicable to an investigation under the authority of a congressional resolution, and others are at least open to the same interpretation. See e.g. the reference in the Compulsory Testimony Act of 1893, 27 Stat. 443 to "any cause or proceeding, criminal or otherwise."

Finally, it is difficult to see what bearing the legislative history of an act adopted in 1954 (The Immunity Act of 1954, 68 Stat. 743 (18 U.S.C. 3486)) could have on the interpretation of an act adopted in 1903 (The Act of February 25, 1903, *supra*) as contended by the appellant. (Appellant's Brief p. 17). The Immunity Act of 1954 was simply a continuation of congressional policy to limit immunity to specific areas, as in this instance, internal security, rather than bestow blanket power to a branch of the government.

D. There are no "sound policy considerations" in conflict with the decision below.

The appellant's argument from "policy" (Appellant's Brief, pp. 19-20) which reflects repeated warnings throughout its brief, seems to be an amalgam of two different points.

1. That the government may be trapped into conferring an unintended immunity because the witness need not claim his Fifth Amendment privilege.

2. That congressional committees may confer immunity on persons whom the Department of Justice would like to prosecute.

As to the first of these points, the appellant's quarrel is not with the decision of the district court, but with the decision of this Court in *United States* v. *Monia*, *supra*.

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[11] 142 Fed. 808, *supra*.

The fact that a subpoena and oath are required of a witness before immunity attaches had been thought, as Mr. Justice Roberts said in *Monia*,[19] to be a sufficient safeguard to the government. If these prerequisites are now deemed inadequate, the cure is simple. Convert these automatic statutes into "claim" type statutes. Indeed a bill for that purpose with reference to the Act here in question was introduced in the last session of Congress. H.R. 8252, 88th Cong. 1st Sess.

The second point, that persons who ought to be prosecuted may be immunized instead, is based on the suggestion that congressional committees are not equipped with the ability or discretion to conduct investigations without needlessly conferring immunity on the wrong people. If this indeed be the case, this appeal would more properly be directed to the Congress than to this Court. But it is hard to believe that the problem is a real one, and that there is or can be no liaison between congressional committees inquiring in this area and the Department of Justice.

In the years that followed the *Armour* case, *supra*, Congress included an immunity provision in almost every major regulatory measure passed.[20]

There is no suggestion here that without the guiding hand of the Attorney General these provisions have proved unworkable. Immunity statutes are not generally thought to be a hindrance to investigation. Indeed they are passed

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[19] 317 U.S. 424, 429-430, *supra*.

[20] See, e.g., 48 Stat. 87 (1933), 15 U.S.C. 77v(c) (1958) (Securities Act); 48 Stat. 1096 (1934), 47 U.S.C. 409(1) (1958) (Communications Act); 49 Stat. 456 (1935), 29 U.S.C. 161(3) (1958) (National Labor Relations Act); 42 Stat. 1001 (1922), as amended, 49 Stat. 1499 (1936), 7 U.S.C. 15 (1958) (Commodity Exchange Act). See *The Federal Witness Immunity Acts* 72 Yale L.J. 1568, 1576 (1963).

for the precise purpose of aiding investigation. Antitrust investigatory problems can be no greater than those encountered by the respective agencies in agriculture, finance, communications, and labor relations investigations. The principal complaint of the appellant appears to be over what it regards as an unwarranted intrusion of Congress into an area the Department of Justice would rather have reserved for itself.

Finally, it is inappropriate for appellant to suggest that "the district court's observation that it would contravene 'traditional American notions of fair play' to require 'a defendant to stand trial for conduct about which he has been compelled to testify by subpoena power of a Congressional Subcommittee' is far wide of the mark." (Appellant's Brief, p. 20, n. 15). First, the appellant's argument that the district court failed to recognize the basic distinction between the power of Congress to compel testimony generally and to compel incriminating testimony, begs the very question here. If immunity attached as the district court held, the appellee's claim against giving incriminating testimony was surrendered.

Secondly, the district court's quoted remarks were but a restatement of this Court's warning in *Monia*, "[T]he statutes in question, if interpreted as the government now desires, may well be a trap for the witness" 317 U.S. 424, 430, as applied to the facts in the instant case. Here in obedience to a subpoena of a Congressional Subcommittee inquiring into matters charged in the indictment the appellee appeared before it and gave testimony as to such matters. To adopt the interpretation of the statutes in question sought by the government, under these circumstances, and thereby deprive the defendant of immunity

would indeed "fly in the face of the traditional American notions of fair play."

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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